(20,756.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 353.

DANIEL B. SCULLY AND MAURICE H. SCULLY, APPELLANTS,

vs.

ARTHUR C. BIRD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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a Supreme Court of the United States.

DANIEL B. SCULLY and MAURICE H. SCULLY, Appellants,
vs.
ARTHUR C. BIRD, Appellee.

Return to Claim of Appeal from the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, to the Supreme Court of the United States.

Mr. Thomas E. Lannen, of Chicago, Illinois, Solicitor for Complainants.
Mr. John E. Bird, Attorney General of Michigan, for Defendant.

1 *Bill for Injunction.*

UNITED STATES OF AMERICA,
State of Michigan, ss:

In the Circuit Court of the United States, Eastern District of Michigan, Southern Division.

To the Judges of the Circuit Court of the United States for the Eastern District of Michigan:

Daniel B. Scully and Maurice H. Scully, of the City of Chicago, State of Illinois, citizens of the United States of America and citizens of the State of Illinois, bring this, their bill, against Arthur C. Bird, of Lansing, in the State of Michigan, and a citizen of the State of Michigan.

Thereupon your orators complain and say: That the business in which your orators are now engaged has been continuously conducted for about thirty-four years, last past, first by your orator Daniel B. Scully until about the year 1886, then for a number of years as a corporation under the *the* name of D. B. Scully Syrup Company, in which both your orators were stockholders, and for about the last ten years and at the present date as a co-partnership between your orators; and that the business of your orators is and has been during all of said time the manufacturing, refining and selling of various food products, and more particularly the manufacturing, blending and selling of syrups used for food products.

2 Your orators further represent that by the expenditure of large sums of money in advertising and promoting their said business they have built up an extensive business in nearly all the States of the Union; and that in the State of Michigan alone, before the commission of the grievances hereinafter complained of, your orators were doing an annual business of about from forty to fifty Thousand Dollars in their various food products.

Your orators further represent that their principal place of business is now and has been during all of said time in the City of Chicago in

the State of Illinois; and that the business in which your orators have been and are now engaged is one that is now and has been during all of said time a business commonly recognized and known as an honorable and legitimate commercial industry and a legal and necessary adjunct to organized society.

Your orators further represent that they have now in the State of Michigan large quantities of syrup manufactured by them amounting to about the sum of Five Thousand Dollars; and that said syrups, prior to the acts hereinafter complained of, found a ready sale to consumers and customers and dealers in the State of Michigan, which sales resulted in fair and continuous profit to your orators.

Your orators further represent that for about the space of about four years last past your orators have been shipping into the State of Michigan large quantities of certain brands of syrup manufactured by them, said brands being known as the "Westmoreland" brand and the "Triumph" brand; said brands of syrup being generally advertised at great expense and became generally known under the
3 names of such brands and an extensive demand for such brands of syrup has been established in the State of Michigan.

You orators further represent that by an Act passed and approved by the General Assembly of the State of Michigan on the Second day of June, A. D., 1893, and by subsequent amendatory Acts thereof, there was created the office of Dairy and Food Commissioner for the State of Michigan, and by said original and amendatory Acts it was made the duty of such dairy and food commissioner to attend to the enforcement of all the laws of the State of Michigan against the unlawful labeling, fraud, adulteration or impurity in foods, sold, offered for sale, exposed for sale or had in possession with intent to sell in the State of Michigan; that the duties of such dairy and food commissioner are fully and clearly set out in said Acts and Acts amendatory thereof, as will more fully appear by said Act and Acts amendatory thereof, to which your orators beg leave to refer for greater certainty in this behalf.

Your orators further represent that by such Act and Acts amendatory thereof it was made the duty of such commissioner to prosecute or cause to be prosecuted any person, firm or corporation engaged in the manufacture or sale of any adulterated or misbranded articles of food or drink in violation of any laws of the State of Michigan.

Your orators further represent that said Arthur C. Bird is now the duly appointed, qualified and acting dairy and food commissioner of the State of Michigan in pursuance to said Act and Acts amendatory thereof, and was such at the several dates hereinafter mentioned.

Your orators further represent unto the Court that on or about the First day of June, A. D., 1906, it came to the notice of your
4 orators that the legality of some of the food products manufactured, sold, offered for sale and exposed for sale by your orators in the State of Michigan was questioned by the said Arthur C. Bird, State Dairy and Food Commissioner, and that thereupon your orators sought and obtained competent legal advice as to the legality of all their said products under the laws of the State of Michigan, and that shortly after said First Day of June your orators procured a

competent attorney to call upon said Arthur C. Bird, State Dairy and Food Commissioner, and the Honorable Attorney General of the State of Michigan, at the City of Lansing, in the said State, to take up and consider with said Commisioner and said Attorney General a proper interpretation of the laws of the State of Michigan when applied to the food products offered for sale by your orators, as aforesaid, and in the State of Michigan, more particularly the said Westmoreland and Triumph brands of syrups so produced by your orators and sold in the State of Michigan as aforesaid; and that the said attorney, representing your orators as aforesaid, on or about the 11th day of June, A. D., 1906, called upon the said Arthur C. Bird, and then and there, in the office of the said Arthur C. Bird, State Dairy and Food Commissioner, in good faith, represented unto said Arthur C. Bird, then and there acting as State—and Food Commissioner of the State of Michigan, that your orators were manufacturers of certain blends of maple and cane syrups, which your orators were desirous of having properly labeled under the laws of the State of Michigan, and then and there asked said Arthur C. Bird what in his opinion as State Dairy and Food Commisioner would be a proper label for the
5 receptacles containing syrup that would be a blend of maple syrup and cane syrup and containing both syrups and no other ingredient or substance; but that the said Arthur C. Bird then and there refused to accept the statement of your orators' said attorney as being made in good faith, but on the contrary stated that none of the syrups manufactured by your orators contained any maple syrup whatever, but that they were mixtures of inferior syrups, containing the flavoring obtained from hickory bark and hickory chips and other substitutes producing imitation maple flavors added to said syrups produced by your orators to give said syrups a maple flavor, and then and there accused your orators' attorney of not being desirous of obtaining a wise and just interpretation of the Food Laws of the State of Michigan when applied to the labeling of a blended syrup composed of maple syrup and cane syrup and no other substance or ingredient; and the said Arthur C. Bird then and there refused to give your orators' said attorney any opinion as to how a blend of maple syrup and cane syrup should be properly and legally labeled under said food laws, and then and there refused to consider how such a blended syrup might legally be labeled under the food laws of Michigan, and insisted that he as State Dairy and Food Commissioner would only permit your orators' syrups, aforesaid, to be sold simply as "Syrup" without any qualifying words whatever to inform the purchasers of the same of the nature of such syrups.

Your orators further represent unto the Court that your orators' said attorney then and there impressed upon the said Arthur
6 C. Bird that he, the said attorney, was acting in good faith on behalf of your orators, and that your orators were about to ship into the State of Michigan large quantities of syrups, composed of maple and cane syrup blended, and then and there prevailed upon the said Arthur C. Bird to call with your orators' said attorney upon the Attorney General of the State of Michigan and to submit to the said Attorney General the question of the proper

legal labeling of such a syrup being a blend of maple syrup and cane syrup.

Your orators further represent unto the Court that your orators' said attorney, being then and there unable to obtain any expression of opinion from said Arthur C. Bird, acting as aforesaid, as to a legal label for a blended syrup, such as produced by your orators, under the Michigan Food Law, then and there went with the said Arthur C. Bird to the office of the Attorney General of the State of Michigan, and then and there, in the presence and hearing of said Arthur C. Bird, submitted to a person (whom your orators are informed and believe was then and there acting as an assistant to and on behalf of the said Attorney General of the State of Michigan) the question of the legal labeling under the Food Laws of Michigan of a syrup being a blend of maple and cane syrups and conceded to contain both syrups; and that your orators' said attorney presented his views and his opinion on the question at issue and stated that in his, your orators' said attorney's opinion a proper legal label under the Food Laws of Michigan for such a syrup, being a blend of maple and cane syrups, would be:

"Maple and Cane Syrup"

but that the said Assistant Attorney General then and there
7 stated that he did not agree with the opinion of your orators' said attorney; whereupon your orators' said attorney then and there asked the said Arthur C. Bird if he would bring a test case in the Courts of the State of Michigan to test the legality of a syrup being a blend of maple and cane syrups and labeled:

"Maple and Cane Syrup"

under the Food Laws of the State of Michigan, or if he, said Dairy and Food Commissioner and the said Assistant Attorney General, would in any manner arbitrate the question at issue further and reach a decision whereby your orator could, with reasonable certainty of not being molested by the said Arthur C. Bird acting as Dairy and Food Commissioner dispose of syrup being a blend of maple and cane syrup, and sell and deal in the same, in the State of Michigan; and that thereupon the said Assistant Attorney General, in the presence and in the hearing of the said Arthur C. Bird, stated to your orators' said attorney in forceful language that they did not arbitrate matters in Michigan, but that they were "fighters"; and that thereupon your orators' said attorney and the said Arthur C. Bird left the office of the said Attorney General.

Your orators' further represent that during the said interview of your orators' attorney with the said Arthur C. Bird, he the said Arthur C. Bird, State Dairy and Food Commissioner, then and there stated that he did not care to consider how a syrup being a blend of maple and cane syrup might be legally labeled under a proper interpretation of the Food Laws of the State of Michigan, and stated

that he, as State Dairy and Food Commissioner, was looked
8 to by the people of the State of Michigan to protect them in the food that they purchased and that he as Dairy and

Food Commissioner would use his judgment in the premises and would not permit a blended syrup to be sold labeled in any other manner than simply as a "Syrup" as hereinbefore stated, without regard to the law of Michigan.

Your orators further represent that upon the return of their said attorney from his said visit with the said Arthur C. Bird, said attorney reported the aforesaid facts concerning all that was said and done during all of said visit, both with said Arthur C. Bird and said Assistant Attorney General; and then and there advised your orators that the proper course for your orators to pursue would be to label your orator's said "Westmoreland" and "Triumph" brands of syrups, being composed of a blend of maple syrup and cane syrup, as nearly as possible in accordance with the wording of the food laws of the State of Michigan.

Your orators further represent that in accordance with the opinion of their said attorney your orators devised the following labels for their "Westmoreland" and "Triumph" brands of syrups, the printed forms of which are herewith filed as exhibits "A" and "B," respectively, and to which your orators ask leave to refer for greater certainty, to-wit:

First. On their "Westmoreland" brand, being a blended syrup composed of maple syrup and cane syrup and no other ingredients whatever, the following label:

"Westmoreland

A
Blend
of
Pure Maple Syrup
and
Pure Rock Candy
9 Syrup

Syrup

Canned only by
D. B. Scully Syrup Co.
Chicago."

Second. On their "Triumph" brand, being a blended syrup composed of maple syrup and cane syrup and containing no other ingredient whatever, the following label:

"Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

Syrup

Packed by
D. B. Scully Syrup Co.
Chicago."

Your orators further represent unto the Court that a rock candy syrup, as named on said labels, is the purest kind of cane syrup, and is in all respects a cane syrup. And your orators further represent that all the cane syrup contained in all of your orators' said brands of syrups, as aforesaid, was and is a rock candy syrup.

Your orators further represent that during the months of July and August, last, your orators sold large quantities of said "Westmoreland" and "Triumph" brands of syrups; and that since about the first day of September, last, your orators have shipped into the State of Michigan large quantities of said brands of syrups each labeled as hereinbefore described, in pursuance to said sales and for the purpose of selling and having the same sold and offered
10 for sale in the State of Michigan; that all of said brands of syrups so shipped into the State of Michigan as aforesaid were composed of maple and rock candy syrups and no other ingredients whatever; and your orators further represent that since said first shipment of said brands of syrups on or about the first day of September, last, they have sold large quantities of said syrups, and have shipped large quantities of the same, all labeled as aforesaid and blended as aforesaid.

Your orators further represent that shortly after the shipment of said brands of syrups labeled as aforesaid into the State of Michigan as aforesaid the said Arthur C. Bird assumed a hostile attitude towards all of said syrups and contended, and has ever since persisted in said contention, that the labeling upon said syrups did not comply with the labeling laws of the State of Michigan, and that the said Arthur C. Bird and his food inspectors, acting under his direction, at once commenced a systematic crusade against the sale of said syrups so labeled as aforesaid in the State of Michigan; that since the shipment of said brands of syrups into the State of Michigan as aforesaid your orators have been informed that said Arthur C. Bird contends that the labels on said "Westmoreland" brand of syrups is illegal because said label contains the following words:

"A Blend of Pure Maple Syrup
and Pure Rock Candy Syrup."

and since said shipment as aforesaid your orators have been further informed that said Arthur C. Bird now contends that the labels on said "Triumph" brand of syrup are illegal because said labels contain the words:

11 "A Delicious Blend of
Pure Maple Syrup And
Pure Rock Candy Syrup."

and that your orators are now informed that said Arthur C. Bird contends that the word "Maple" should not appear on any of said labels in any manner or form whatever, even though said syrups actually contained a representative proportion of pure maple syrup, as aforesaid.

Your orators further represent that they are informed and believe that the aforesaid brands of syrups are legally labeled under the laws of the State of Michigan, and in accordance with the wording of the Michigan Statutes, to which Statutes your orators beg leave to refer for greater certainty in this behalf.

Your orators further represent that they are informed and believe that the said crusade, waged against their said brands of syrup by the said Arthur C. Bird and his inspectors, is not in good faith, but that the same is actuated by malice and ill will on the part of said Arthur C. Bird towards your orators, growing out of the conference between your orators' said attorney and the said Arthur C. Bird hereinbefore referred to, and that the activity of said Arthur C. Bird to prevent the sale of said brands of syrups is caused by the malicious desire on the part of said Arthur C. Bird to ruin your orators' business in the State of Michigan.

Your orators further represent that the said crusade against said brands of syrups, conducted by the said Arthur C. Bird, has, ever since the shipment of said brands of syrups into the State of Michigan as aforesaid, consisted in the visiting by the said Arthur
12 C. Bird, and his food inspectors, acting under his direction, of all grocers, merchants and dealers in said syrups, and informing said grocers and dealers in person, that said brands of syrups were not legally labeled and that the selling of said brands of syrups, labeled as aforesaid, would entail said grocers and dealers in criminal prosecutions.

Your orators further represent that it is and has been the custom and practice of said Arthur C. Bird ever since the shipment of the brands of syrups as aforesaid to write numerous letters to all grocers and dealers in the said State of Michigan, known to be dealing in and selling said syrups, labeled as aforesaid, warning said grocers and dealers that such syrups were illegally labeled and directing and requesting said grocers and dealers to return all of said syrups to your orators or other persons of whom they had purchased said syrups; and that during all of said time it has been the custom and practice of said Arthur C. Bird to request in the said letters a prompt reply from the said grocers and dealers as to what cause they had pursued in relation to said syrups, and what, if any, action they had taken in pursuance to his direction contained in his said letters as to the return of said syrups.

That the following is an example of various letters sent by said Arthur C. Bird to grocers and dealers, as aforesaid:

Michigan Dairy and Food Department, Lansing.

A. C. Bird, Commissioner. C. C. Lillie, Deputy Commissioner.
Floyd W. Robinson, State Analyst.

DETROIT, *Dec.* 21, 1906.

13 Gallagher Bros., Detroit, Mich.

GENTLEMEN: You are hereby notified that the Maple Syrup bearing the name and address of the D. B. Scully Syrup Co. of Chi-

cago, Illinois, as manufacturers, and which you have in stock must be removed from sale in this State until properly labeled.

You will kindly write me by return mail with reference to your position in this matter.

Very truly yours,

(Signed) A. C. BIRD,

State Dairy and Food Commissioner.

Your orators further represent that a large number of said grocers and dealers in your orators' said syrups in the State of Michigan aforesaid, fearing to incur the enmity of the said Arthur C. Bird, hastened to return said syrup, labeled as aforesaid, to your orators and other persons of whom they had purchased said syrup, and declined to further deal in said syrups or any other goods manufactured by your orators; that a number of said grocers and dealers in said syrups, after having returned the same, either to your orators or other persons from whom they had purchased said syrups, wrote the said Arthur C. Bird as to their action as aforesaid, and thereupon it has been the custom and practice of the said Arthur C. Bird to again write said grocers and dealers so answering his original letter, as aforesaid, commending said grocers and dealers for the course they had taken in returning said syrups as aforesaid.

14 Your orators further represent that it has been during all of said time also the custom and practice of said Arthur C. Bird, and his food inspectors, acting under his directions, in many instances, upon visiting the stores and places of business of grocers and dealers handling your orators' said syrups to remove with their own hands your orators' said brands of syrups from the shelves of said grocers and dealers, where the same were exposed for sale, and to place such syrups upon the floor, where the same would not be exposed for sale; and said grocers and dealers were thereupon instructed by said inspectors to return said syrups as aforesaid; and your orators further represent that in many cases your orators' said syrups were taken from the shelves as aforesaid, by said food inspectors, without the consent or assistance of the said grocers or dealers so handling your orators' said syrups as aforesaid; that in no case, so far as your orators are informed and believe, was any sample taken of such syrups, so taken from the shelves as aforesaid, nor were the said syrups sealed as required by the Statutes of the State of Michigan, nor were any prosecutions ever commenced against said grocers or dealers, although ample time has elapsed since the acts complained of as aforesaid.

Your orators further represent that they, directly and through their agents and jobbers in the State of Michigan, have received various letters and communications informing your orators of the hostile attitude of said Arthur C. Bird towards your orators' said brands of syrups, said agents, jobbers, grocers and dealers further informing your orators that they must decline further to han-

15 dle or deal in your orators' said brands of syrups, because of the said attitude of the said Arthur C. Bird towards said syrups; that your orators thereupon took up by correspondence with

the said Arthur C. Bird the question of the legality of the labeling of said brands of syrups; that said Arthur C. Bird wrote your orators that said syrups were not legally labeled and could not be sold in the State of Michigan; and that thereupon your orators again consulted their said attorney and were again advised that their said syrups were legally labeled and complied with all of the laws of the State of Michigan; and that thereupon your orators mailed the following letter to said Arthur C. Bird:

"Hon. A. C. Bird, State Food Commissioner, Lansing, Mich.

DEAR SIR: We are in receipt of your esteemed favor of December first, and in reply to same will say that we have again consulted with our attorney and have been advised that the position taken by you is not warranted by a proper construction of the meaning of your food law; that we cannot accede to your request to withdraw our goods from your State, as we are informed and believe the same are properly and legally labeled under your food law; and that in justice to ourselves and all law-abiding manufacturers, we will continue to sell our goods in Michigan, labeled as they are now labeled, until your courts render a decision that such goods so labeled are illegal.

16 Under the circumstances, therefore, if you as food commissioner consider our goods illegal, it is your duty to prosecute the same without dealy, or drop the matter at once. Under the law of the land, our goods are presumed to be legal, and dealers who sell them presumed to be innocent, until they are proven otherwise.

Yours very truly,

(Signed) D. B. SCULLY SYRUP CO."

and that thereupon your orators received the following letter from said Arthur C. Bird:

"D. B. Scully Syrup Co., 416-428 Illinois St., Chicago, Ill.

GENTLEMEN: Replying to your letter of December 6th I would say that you have made your intentions in the matter very plain to me for which I thank you. Of course I shall have to be governed according to your final determination which I understand your letter expresses.

Very truly yours,

(Signed) A. C. BIRD,

Dairy and Food Commissioner."

Your orators further represent that the said Arthur C. Bird, though often requested to commence a prosecution against your orators' agent and jobbers and against grocers and dealers handling your orators' said syrups as aforesaid, has persistently neglected and refused so to do; that on or about the 17th day of December, A. D., 1906, said Arthur C. Bird personally called upon C. H.

17 Granger, a member of the firm of G. W. Granger & Company, who, on said date, and for some time prior thereto,

had been handling and distributing your orator's said syrups labeled as aforesaid in the City of Detroit, State of Michigan, and that at the time of said visit of said Arthur C. Bird as aforesaid said G. W. Granger & Company were selling and exposing for sale in the State of Michigan large quantities of your orators' "Westmoreland" and "Triumph" brands of syrups, hereinbefore referred to and labeled as aforesaid, and that this fact was then and there brought to the personal attention of the said Arthur C. Bird, and the said C. H. Granger then and there requested the said Arthur C. Bird, on behalf of the said firm of G. W. Granger & Company, and of your orators, to bring prosecution against the said G. W. Granger & Company for selling and exposing for sale your orators' said brands of syrups as aforesaid; that said Arthur C. Bird then and there refused to commence any such prosecution, stating as a reason therefor that if such prosecution were started your orators would defend same, and by carrying the case into the Courts might gain immunity from further prosecutions until such case was decided by the Courts; that said Arthur C. Bird then and there stated to said C. H. Granger that he would not allow or permit said brands of syrups, labeled as aforesaid, to be sold in the State of Michigan.

Your orators further represent that in their endeavor to obtain an opportunity to defend said brands of syrups and the labeling thereof in the Courts of the State of Michigan, your orators
18 addressed and dispatched a letter to his excellency Fred M. Warner, Governor of the State of Michigan, in which letter your orators stated the facts in regard to the conduct of said Arthur C. Bird substantially as above set forth, and requested said governor to take some action to cause the said Arthur C. Bird to commence prosecution so that the legality of the labeling on said brands of syrups could be determined by the Courts, a copy of which said letter is filed herewith as Exhibit "C," and to which your orators beg leave to refer for greater certainty; and that thereupon your orators received a reply from the said Governor Warner, stating that said Governor was in entire accord with the Food Department, and offering no relief whatever, a copy of which said letter is filed herewith as Exhibit "D," and to which your orators beg leave to refer for greater certainty.

Your orators further represent that they have used every effort and employed every means to induce the said Arthur C. Bird to commence prosecution against parties so handling, selling and dealing in your orators' said brands of syrups in the State of Michigan, but that all the efforts of your orators to bring about such prosecution, so that your orators might thereby have the opportunity of defending the legality of the said brands of syrups in the proper courts of the State of Michigan and in a proper manner, have failed, on account of said Arthur C. Bird refusing and neglecting to bring such prosecution; and your orators further represent that they have no desire to stifle or prevent any or all prosecutions directed against their said brands of syrups, or against any or all dealers who may be handling said syrups in the State of Michigan; that your
19 orators are anxious and willing to defend any such prosecution, to the end that the legality of their said syrups may be

established by the proper Courts, and the reputation of the business integrity of your orators vindicated.

Yours orators further represent that all the acts and doings of the said Arthur C. Bird, as above specified, in relation to the prohibition of the sale of your orators' said syrups in the State of Michigan are entirely unauthorized by the Statutes of the State of Michigan, and the said Arthur C. Bird, in committing said acts above complained of, was and is acting as a private citizen of the State of Michigan, but under cover of his said office of Dairy and Food Commissioner; that the power and duties of the said Arthur C. Bird as Dairy and Food Commissioner of the State of Michigan, are clearly defined and fixed by the terms of the Statutes of the State of Michigan, to which Statutes your orators beg leave to refer for greater particularity in this behalf.

Your orators further represent that grocers, merchants and dealers in the State of Michigan cannot be induced to handle or sell any food products pronounced illegal by said Arthur C. Bird, because said grocers, dealers and merchants have learned from experience that it is ruinous to their business to do so, because of the extensive arbitrary powers exercised by said Arthur C. Bird over business in food products in the State of Michigan; that if any such grocers or dealers should oppose said Arthur C. Bird's wishes in the handling of any food product said grocers and dealers fear that said
20 Arthur C. Bird might declare that many or all the goods handled by said grocers or dealers were illegal, and by conducting a campaign against their said goods similar to the campaign now being conducted by said Arthur C. Bird against your orators' said syrups as aforesaid, utterly ruin said grocers and dealers; that by reason of the premises the mere word of said Arthur C. Bird is law in effect with said grocers and dealers and they are thereby intimidated into carrying out the wishes of said Arthur C. Bird without regard to whether said Arthur C. Bird is proceeding in accordance with law, or wholly outside of his powers and duties as aforesaid.

Your orators further represent that the said Arthur C. Bird is threatening to persist in the doing of said acts above complained of, and your orators believe that he will carry out said threats unless restrained by injunction from this Honorable Court.

Your orators further represent that they have already sustained losses in excess of Twenty-five Hundred Dollars by reason of said Acts of said Arthur C. Bird, and that your orators will suffer far greater loss, amounting to Ten Thousand Dollars or more, if the said Arthur C. Bird is permitted to continue the doing of the acts complained of; that the said acts of said Arthur C. Bird, if allowed to continue will result in a continuing injury to your orators, which injury could not be adequately compensated for in damages in actions at law against said Arthur C. Bird.

Your orators further represent that the financial responsi-
21 bility of said Arthur C. Bird is wholly insufficient to enable said Arthur C. Bird to respond in damages to your orators for loss to your orators resulting from the said acts of the said Arthur

C. Bird above complained of, if the said Arthur C. Bird is permitted to carry out his threats and continue the commission of said acts.

Forasmuch, therefore, as your orators are without remedy in the premises, except in a Court of Equity, and to the end that the said Arthur C. Bird, who is hereby made a defendant to this Bill of Complaint, may be required to make full and complete answer to the same, but not under oath, answer under oath being hereby expressly waived, and that said defendant, Arthur C. Bird, be restrained by an injunction issuing out of this Honorable Court for committing any of the acts above complained of, to-wit:

First. From writing any letters over his official signature stating that your orators' said brands of syrups are illegally labeled under the laws of the State of Michigan, and that said syrups cannot be sold or offered for sale in the State of Michigan, and instructing grocers and dealers handling said syrups that said syrups must be returned to the person or persons of whom the same were purchased; and mailing and addressing and dispatching said letters to grocers and dealers handling your orators' said brands of syrups for the purpose of inducing said grocers and dealers to discontinue the handling of said syrups, and thereby damaging the business of your orators as aforesaid.

Second. From visiting, either in person or by deputy, the
22 places of business of grocers and dealers so handling your orators' said brands of syrups in the State of Michigan aforesaid, and telling said grocers and dealers that your orators' said syrups are illegally labeled and cannot be sold in the State of Michigan, and instructing said grocers and dealers to return said syrups to the parties from whom they had purchased same, and thereby intimidating said grocers and dealers into returning said syrups to the persons from whom they have purchased same, and into declining to further deal in said syrups, and thereby irreparably damaging the business of your orators as aforesaid.

Third. From visiting, either in person or by deputy, the places of business of grocers and dealers as aforesaid and removing with their own hands your orators' said syrups from the shelves of said grocers and dealers without the consent or assistance of said grocers and dealers and without taking any samples and sealing said goods according to the provisions of the Statutes of the State of Michigan, and without commencing and prosecutions against said grocers and dealers for handling of said syrups.

Fourth. From threatening, either personally or by letter, grocers and dealers handling your orators' said syrups in the State of Michigan with prosecution unless said grocers and dealers discontinue the handling of your orators' said syrups, said threats being malicious and without and intention on the part of said Arthur C. Bird to carry out the said threats, said threats being made by the said Arthur

C. Bird for the sole purpose, and with the intent, of intimi-
23 dating said grocers and dealers into declining to further deal in your orators' said syrups, and said threats being made by the said Arthur C. Bird with the malicious intent of destroying your

orators' said business in the said syrups in the State of Michigan; provided always, however, that nothing herein contained shall be construed to prevent said Arthur C. Bird from proceeding according to the Statutes of the State of Michigan to charge and prosecute any person whatever so handling your orators' said syrups in the State of Michigan as aforesaid, or to procure samples of said syrups therefor from any person so handling the same, in manner and form as provided by the Statutes of the State of Michigan.

And may it please your Honors to grant such further relief in the premises as to your Honors may seem meet and Equity may require.

May it please your Honors to grant the Writ of Subpœna in Chancery, directed to the Marshal of the said Eastern District of Michigan, commanding him that he summon the defendant, Arthur C. Bird, to appear before said Court on the March Rule Day of said Court, being the Fourth day of March, A. D. 1907. And may it please your Honors to grant unto your orators the People's Writ of Injunction, to be directed to the said Arthur C. Bird, restraining him from doing and committing the various acts above set forth until the further order of this Court.

DANIEL B. SCULLY,
MAURICE H. SCULLY,
By THOMAS E. LENNAN,
Their Solicitor.

24 STATE OF ILLINOIS, *County of Cook, ss:*

On this 22nd day of January, A. D. 1907, before me personally appeared the above named Maurice H. Scully and made oath that he has read the above Bill subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and that as to those matters he believes it to be true.

MAURICE H. SCULLY.

Subscribed and sworn to before me this 22nd day of January, A. D. 1907.

[SEAL.] GRACE S. BRIGGS,
Notary Public.

STATE OF ILLINOIS, *Cook County, ss:*

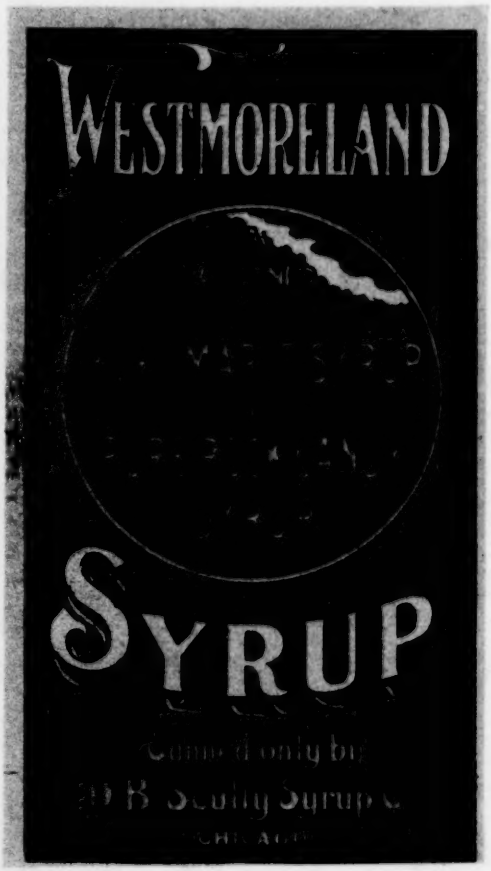
I, Joseph F. Haas, County Clerk of the County of Cook, do hereby certify that I am the lawful custodian of the official record of Notaries Public of said County, and as such officer am duly authorized to issue certificates of magistracy; that Grace S. Briggs whose name is subscribed to the annexed Jurat, was, at the time of signing the same, A Notary Public in Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths, and to take acknowledgments and proofs of deeds or conveyances
25 of lands, tenements or hereditaments, in said State of Illinois, all of which appears from the records and files in my office;

that I am well acquainted with the handwriting of said Notary, and verily believe that the signature to the said Jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the City of Chicago, in the said County, this 22 day of Jan., 1907.

[SEAL.] JOSEPH F. HAAS,
County Clerk.

COMPLAINANTS' EXHIBIT "A."



26 COMPLAINANTS' EXHIBIT "B."

COMPLAINANTS' EXHIBIT "C."

Copy. Copy.

To His Excellency Fred M. Warner, Governor of Michigan.

SIR: Through force of circumstances, I am compelled, as attorney for the D. B. Scully Syrup Company, of this City, to call your attention to certain actions of one of your subordinate officials, appointed by you and subject to your control, which actions purport to be official and are greatly and unjustly damaging and ruining legitimate interests and rights of the D. B. Scully Syrup Company, without, in my opinion, any warrant of any law of the State of Michigan.

The trouble arises from what is, apparently, an erroneous
27 interpretation of the Food Law of the State of Michigan by your Honorable Attorney General and your Honorable State Food Commissioner; and it is to certain actions of the latter official that I wish to call your attention, and against which I wish to protest.

The Food Commissioner claims, and is supported in his contention by an opinion of the Attorney General, that it is illegal to sell a mixture of Maple Syrup and Rock Candy Syrup in the State of Michigan under the label attached to this letter.

In June of this year I argued this matter fully, in the City of Lansing, with the Food Commissioner and the Attorney General's office, and not being able at that time to convince the Food Commissioner or the Attorney General's office that their interpretation of the food law was wrong, I requested the Food Commissioner, in behalf of a large number of syrup firms doing business in Michigan, to take the matter into court by bringing prosecutions and thus have the point involved definitely settled by the Courts. This the Food Commissioner declined to do. I then told the Food Commissioner that all the clients I represented would continue to sell syrups in Michigan under labels similar in form to the one enclosed until the courts had declared the labels illegal. The D. B. Scully Company, among others, then prepared a large number of labels and shipped a large quantity of syrup labeled with the label enclosed, the syrup being a true blend of Maple Syrup and Rock Candy Syrup.

The syrup shipped as aforesaid has, to the personal knowledge of the Food Commissioner, been openly exposed and offered for sale and sold, and is now being exposed for sale, offered for sale and sold, in the State of Michigan.

28 It would seem, therefore, that under the plain wording of the Michigan Food Law, and especially on account of the opinion held by the Food Commissioner, supported by the opinion of the Attorney General, it is the duty of the Food Commissioner to prosecute in Court any and every person selling this syrup under this label in the State of Michigan, or offering or exposing it for sale in Michigan.

But the Food Commissioner, entirely ignoring the Statute, has been for some time, and is now, writing letters to dealers, and send-

ing his inspectors around to dealers, and demanding that they take these goods off their shelves and cease selling them and ship them back to the Scully Company or to the jobbers from whom they bought them; and said Food Commissioner is in every way possible, and without due process of law, endeavoring to and is destroying the business of the D. B. Scully Company on these goods.

Now, I submit to your Excellency that this practice is underhanded, unfair and cowardly on the face of it; and not worthy of a State Official who believes the Courts of his State are able to punish offenders against the State Laws to the full extent specified in the Laws.

The practice of using official power and position to ruin a firm's business without giving that firm a chance to defend themselves in court is pernicious, and needs no argument to condemn. It was expressly guarded against by the Congress of the United States in conferring powers on officials to enforce the Federal Food Law; and is not resorted to by any officials who have faith in their Courts.

The Food Commissioner may urge that he does not wish
29 to punish citizens of Michigan by bringing prosecutions; but I respectfully submit that G. W. Granger & Company, 159 Jefferson Avenue, Detroit, Michigan, are openly selling these goods, in violation of the State Food Law if they are illegal; that the Food Commissioner called on them personally on December 17th, that they requested him to bring suit against them for selling these goods; and that he has declined to do so.

I enclose you herewith copies of letters which will give you more light on this controversy; and as we are practically without a remedy in law, I appeal to your sense of justice and fair play, and request that, if it is within your power to do so, you have your Food Commissioner either bring these cases into the Courts of Michigan or at once abandon his unfair tactics of using his official position to destroy business interests on a mere unjudicial interpretation of the Food Law.

You will note from the enclosed correspondence that this matter requires immediate attention; and an early reply from you in this behalf will be greatly appreciated; for if you decline to act in any way in this matter, we will be obliged to follow whichever other course may be open to us.

Respectfully submitted.

THOMAS E. LANNEN,
Attorney in This Behalf for the
D. B. Scully Syrup Company.

Dated December nineteen, 1906.

30 COMPLAINANTS' EXHIBIT "D."

Copy.

STATE OF MICHIGAN, EXECUTIVE OFFICE,
LANSING, *Dec.* 29, 1906.

Mr. Thomas E. Lannen, Attorney for the D. B. Scully Syrup Company, First National Bank Building, Chicago, Ill.

DEAR SIR: I beg to acknowledge receipt of your letter of December 19. I have carefully noted the contents of your letter and all enclosures. Since the receipt of your letter I have made inquiries regarding the position taken by the Dairy and Food Commissioner and am in entire accord with that Department.

Under these circumstances, it is hardly necessary for me to go into detail in answering your communication. Your position is quite clearly set forth and as already stated, I have noted with care your differences of opinion with the Commissioner.

Yours respectfully,
(Signed) FRED M. WARNER, *Governor.*

Filed in Clerk's Office January 23rd, 1907.
WALTER S. HARSHA, *Clerk.*

31 *Affidavit of W. B. Rademacher.*

STATE OF MICHIGAN, *County of Wayne, ss:*

W. B. Rademacher, being first duly sworn, deposes and says:

That he is now and has been some time previous to the month of December, 1906, in the retail grocery business at 145 Gratiot Ave. in the City of Detroit, State of Michigan.

Affiant further says that on or about December 20th, 1906, two men, claiming to represent State Dairy and Food Commissioner A. C. Bird of the State of Michigan, came into affiant's store, and that said parties upon ascertaining that affiant was exposing and offering for sale the "Triumph" Brand Syrup, manufactured by D. B. Scully Syrup Co., Chicago, Ill., told affiant that the said "Triumph" Brand of Syrup was illegally labeled under the Laws of the State of Michigan, and that said "Triumph" Brand of Syrup would not be sold or exposed for sale any more and must be removed from the shelves where such syrup was exposed for sale.

Affiant further says that he does not want to get into trouble and, therefore, has decided to quit selling said "Triumph" Brand of Syrup.

Affiant further says that the "Triumph" Brand of Syrup, which was exposed for sale upon affiant's shelves upon the day that aforesaid two men were visiting affiant's store, bore the following label and none other:

"Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

32 Syrup

Packed By
D. B. Scully Syrup Co.
Chicago.

And further affiant saith not.

WM. B. RADEMACHER.

Subscribed and sworn to before me this 14th day of January, A. D. 1907.

[SEAL.] HARRY E. HUNT,
Notary Public, Wayne County, Michigan.

My Commission Expires March 7/1908.

Filed in Clerk's Office Jan. 23, 1907.
WALTER S. HARSHA, *Clerk.*

Affidavit of Edward Sielaff.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, comes the said Complainants by their said solicitor and file in this cause the affidavit of Edward Sielaff, which said affidavit is in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

Edward Sielaff, 629 Roosevelt St., Detroit, Michigan, being first duly sworn, deposes and says:

That he is seventeen years of age and is employed as grocery clerk in the grocery store and meat market of Sielaff & Son, 629
33 Roosevelt St., Detroit, Mich., and was so employed on or about December 15th, 1906, and that on or about said date, during the absence of members of said firm, two State Food Inspectors, representing A. C. Bird, State Dairy and Food Commissioner of the State of Michigan, inspected the "Triumph" Brand of Syrup, manufactured by D. B. Scully Syrup Co. of Chicago, Illinois, and inquired of affiant whether said firm of Sielaff & Son had sold any of said "Triumph" Brand Syrup, and upon being informed that such sales had been made, said inspectors told affiant to sell no more of such "Triumph" Brand Syrup, as the label on said Brand of Syrup was illegal under the Laws of the State of Michigan, and that said Brand of Syrup must be returned to

Grones & Brehmer, Detroit, Mich., of whom said brand of syrup had been purchased.

Affiant further says that thereupon said two inspectors with their own hands and without co-operation or assistance of said affiant, removed forty-four bottles of said "Triumph" Brand Syrup from the shelves of said firm, where the same were exposed for sale and placed them on the floor in a corner of said store. Affiant further says that about a week later, the said firm of Sielaff & Son received a letter signed by A. C. Bird, State Dairy and Food Commissioner of the State of Michigan, asking whether said "Triumph" Brand Syrup had been returned in accordance with the orders of said inspectors, as aforesaid.

Affiant further says that before the receipt of said letter as aforesaid, the said firm of Sielaff & Son had returned said "Triumph" Brand of Syrup to said Grones & Brehmer, in compliance
34 with the orders of said inspectors as aforesaid, and affiant further says since such notification by said inspectors, as aforesaid, said firm of Sielaff & Son have declined to sell or expose for sale or purchase for the purpose of sale or have in their possession any of said "Triumph" Brand of Syrup, and affiant further says that said "Triumph" Brand, so handled by said firm of Sielaff & Son, found ready sale; and affiant is informed and believes that said "Triumph" Brand of Syrup gave universal satisfaction to purchasers and consumers of such syrup.

Affiant further says that said firm of Sielaff & Son would have continued to handle said "Triumph" Brand of Syrup, labeled as aforesaid, if they had not been notified by said food inspectors aforesaid that the label on such "Triumph" Brand of Syrup did not comply with the Laws of the State of Michigan.

Affiant further says that all the "Triumph" Brand of Syrup, which was exposed for sale upon the shelves of said firm upon the day that said store was visited by said inspectors aforesaid, bore the following label and no other:

"Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

Syrup

Packed By
35 D. B. Scully Syrup Co.
Chicago."

And affiant further saith not.

EDWARD SIELAFF.

Subscribed and sworn to before me this 14 day of January, A. D., 1907

[SEAL.] HARRY E. HUNT,
Notary Public, Wayne Co., Michigan.

My Commission Expires March 7/1908.

Affidavit of J. W. Burkhardt.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, comes the said Complainants by their said solicitor and file in this cause the affidavit of J. W. Burkhardt, which said affidavit is in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

J. W. Burkhardt, being first duly sworn deposes and says:

That he is now, and has been for some time prior to the month of December, 1906, the manager of the grocery department of J. L. Hudson's department store in the City of Detroit and State of Michigan; and that on or about the 20th day of December, 1906, A. C. Bird, State Food Commissioner of the State of Michigan, and a party representing himself to be a State Food Inspector, called at the grocery department aforesaid and told affiant that a certain
36 brand of syrup then and there being offered and exposed for sale in said grocery department, said syrup being labeled:

"Westmoreland

A Blend of Pure
Maple Syrup
and
Pure Rock Candy
Syrup

Syrup

Canned only
By
D. B. Scully Syrup Co.
Chicago, Ill."

was not legal under the food law of the State of Michigan, and that affiant must take it from the shelves of said department store, and return said syrup to G. W. Granger & Company, of Detroit, from whom the said syrup was purchased.

Affiant further says that said food commissioner and said food inspector did not, at said time, or at any other time, take a sample or any portion of said syrup in said grocery department, but simply told affiant to return said syrup as aforesaid.

Affiant further says that on account of said Bird being State Food Commissioner, he, said affiant, acquiesced in his demand and returned said syrup to the said G. W. Granger & Company, and decided not to handle any more of said syrup, and still declines so to do.

Affiant further says that all of said syrup exposed for sale upon the shelves of said grocery department upon the day and at the time said grocery department was visited by said Food Commissioner Bird and said Food Inspector, as aforesaid, bore the aforesaid label and none other.

37 "Westmoreland

A Blend of Pure
Maple Syrup
and
Pure Rock Candy
Syrup

Syrup

Canned only By
D. B. Scully Syrup Co.
Chicago, Ill."

And further affiant saith not.

J. W. BURKHARDT.

Subscribed and sworn to before me this 14th day of January A. D., 1907.

[SEAL.] G. SAMUEL FIELD,
Notary Public, Wayne County, Michigan.

My Commission Expires Aug. 11/07.

Affidavit of John B. Sheehan.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, comes the said Complainants by their said solicitor and file in this cause the affidavit of J. B. Sheehan, which said affidavit is in words and figures as follows:

STATE OF MICHIGAN, *County of Wayne, ss:*

38 J. B. Sheehan, being first duly sworn, deposes and says: That he is now and has been for some time prior to the month of December, 1906, the manager of the Grocery Department of Pardridge & Blackwell's Department Store, in the City of Detroit, Michigan.

Affiant further says that in the forepart of the month of December, 1906, State Dairy & Food Commissioner, A. C. Bird and one of said Bird's inspectors, called at the Grocery Department of aforesaid store, and that said Bird bought and paid for one can of the "Westmoreland" Brand of Syrup, manufactured by the D. B. Scully Syrup Company of Chicago, Illinois, and that said Bird left a printed slip with affiant, the nature and contents of which said slip affiant does not remember.

Affiant further says that said Bird told affiant at that time that

such can of "Westmoreland" Syrup was wanted for analytical purposes, and that affiant might continue selling such "Westmoreland" Brand of Syrup until further notice.

Affiant further says that about one week after said visit of said Bird and said inspector at the aforesaid store, said Bird and said inspector again called at the aforesaid store and told affiant not to sell any more "Westmoreland" Syrup for the reason that said "Westmoreland" Brand of Syrup was illegally labeled as it contained very little Maple.

Affiant further says that in obedience to said order from said State & Dairy Food Commissioner Bird, he, the affiant, has decided to quit, and has quit, the selling of said "Westmoreland" Brand of Syrup.

Affiant says that at the time of said Bird's purchasing said
39 one can of "Westmoreland" Brand Syrup, said can bore the following label and no other:

"Westmoreland

A
Blend
of
Pure Maple Syrup
and
Pure Rock Candy
Syrup

Syrup

Canned only by
D. B. Scully Syrup Co.
Chicago."

And further affiant saith not.

J. B. SHEEHAN.

Subscribed and sworn to before me this 14th day of January, A. D. 1907.

[SEAL.] G. SAMUEL FIELD,
Notary Public, Wayne Co., Mich.

My commission expires Aug. 11/07.

Affidavit of Benjamin L. Hallock.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, come the said Complainants by their solicitor and file in this cause the affidavit of Benjamin L. Hallock, which said affidavit is in words and figures as follows, to-wit:

40 STATE OF MICHIGAN, *County of Wayne, ss:*

Benjamin L. Hallock, of Detroit, Michigan, being duly sworn, deposes and says that on and about the 23rd day of December, A. D. 1906, he was employed in the capacity of a clerk by J. Hallock, who

is engaged in the retail grocery business at the corner of Michigan Ave. and Fifth Street, in the City of Detroit; that on or about the 15th day of December, 1906, two men representing themselves to be state food inspectors and representing State Dairy and Food Commissioner A. C. Bird, called at the store where deponent was working, at the said address, and seeing bottles and cans of "Triumph Syrup" and "Westmoreland Syrup," manufactured by the D. B. Scully Syrup Company, of Chicago, Ill., exposed for sale, said food inspectors told deponent that the aforesaid two brands of syrup were labeled illegally and that if affiant would keep on selling or exposing for sale the aforesaid brands of syrups, or if said aforesaid two inspectors should find them again on affiant's shelves, that affiant or his employer would be fined.

Affiant further says that he told his said employer, J. Hallock, of said conduct and statements of said food inspectors, and that thereupon the said employer, J. Hallock returned all the stock on hand of said "Triumph" brand of syrup to said G. W. Granger & Company, from whom the said syrup was purchased, for the reason that the said employer, J. Hallock did not want to get into trouble with the state food commissioner.

Affiant further states that at the time said two inspectors
41 called as aforesaid all of the "Triumph Syrup" and "Westmoreland Syrup" aforesaid, exposed for sale on the shelves where affiant was employed, bore the following labels and none other:

"Westmoreland
A
Blend
of
Pure Maple Syrup
and
Pure Rock Candy
Syrup
Syrup
Canned only by
D. B. Scully Syrup Co.
Chicago."

"Triumph
A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup
Syrup
Packed by
D. B. Scully Syrup Co.
Chicago, Ill."

And further affiant saith not. B. L. HALLOCK.

Subscribed and sworn to before me this 14 day of January, A. D. 1907.

[SEAL.] HARRY E. HUNT,
Notary Public, Wayne County, Michigan.

42 My commission expires March 7, 1908.

Affidavit of H. H. Blackadder.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, come the said Complainants by their solicitor and file in this cause the affidavit of H. H. Blackadder, which said affidavit is in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

H. H. Blackadder, being first duly sworn, deposes and says:

That he is in the retail grocery business at 14th & McGraw Ave., Detroit, Michigan, and that in the latter part of November, 1906, and for some time prior thereto, he had been dealing in "Westmoreland" and "Triumph" Brands of Syrups, manufactured by D. B. Scully Syrup Company of Chicago, Illinois, and that on or about such time aforesaid, a person introducing himself as State Food Inspector, representing A. C. Bird, State Dairy and Food Commissioner of the State of Michigan, called at affiant's place of business, and that said inspector upon ascertaining that affiant was exposing and offering for sale said two Brands of Syrups, informed affiant that the said two Brands of Syrups were illegally labeled under the Laws of the State of Michigan, and that said two Brands of Syrups could not be sold or exposed for sale any more, and must be removed from the shelves where such syrups were exposed for sale.

43 Affiant further says that a day or two after such notification by said inspector, affiant removed the said two Brands of Syrups from the shelves and returned the same to G. W. Granger & Company, from whom affiant had purchased said two Brands of Syrups, and since said notification, aforesaid, affiant has declined to offer for sale or deal in said two Brands of Syrups, for the reason that he does not wish to oppose the directions received from said A. C. Bird as aforesaid.

Affiant further states that shortly after said food inspector's visit, as aforesaid, affiant received a letter from State Dairy and Food Commissioner A. C. Bird, warning affiant not to sell the said two Brands of Syrups and to notify the said Food Commissioner Bird of the course affiant had taken in the matter. Affiant further says that he answered State Food Commissioner Bird's letter stating that affiant had returned all of the said two Brands of Syrups to said G. W. Granger & Co., Detroit, Mich., in compliance with the order of said inspector and in accordance with the request contained in said letter so received by affiant from State Food Commissioner A. C. Bird.

Affiant further says that thereupon he received another letter from

State Food Commissioner Bird commending his course in relation to the said two Brands of Syrups.

Affiant further says that the "Triumph" Brand of Syrup and the "Westmoreland" Brand of Syrup, which were exposed for sale upon the shelves of said affiant's store upon the day that said store was visited by said inspector aforesaid, bore each respectively the following labels and none other:

"Westmoreland

44 A
Blend
of
Pure Maple Syrup
and
Pure Rock Candy
Syrup

Syrup

Canned only by
D. B. Scully Syrup Co.
Chicago."

"Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

Syrup

Packed by
D. B. Scully Syrup Co.
Chicago."

And further affiant saith not.

—— ——.

Subscribed and sworn to before me this — day of ——, A. D. 1907.

—— ——,
Notary Public.

STATE OF MICHIGAN, *County of Wayne, ss:*

Harry E. Hunt, of Detroit, Michigan, being duly sworn,
45 deposes and says that he is a Notary Public in and for said County; that on the 14th day of January, A. D. 1907, at the request of one, B. Koepke, he accompanied the said Koepke to the retail grocery store at the corner of 14th Ave. and McGraw, owned and operated by one, H. H. Blackadder;

Deponent further says that he saw the said Koepke present to the said Blackadder the annexed statement, which the said Blackadder thereupon read and pronounced to be a correct statement, and in conformity with the facts.

Deponent further says that when the said Koepke requested the said Blackadder to sign said statement and affidavit, the said Blackadder refused so to do, stating as a ground that he would not mix up in litigation, and that he, said Blackadder, never signed his name to any paper of the kind; that he was afraid he would sign away his birthright, whereupon deponent and the said Koepke left the said Blackadder, and further deponent sayeth not.

HARRY E. HUNT.

Subscribed and sworn to before me, this 14th day of January, A. D. 1907.

[SEAL.] M. M. NESBITT,
Notary Public, Wayne County, Michigan.

My commission expires Oct. 7, 1907.

Affidavit of G. H. Granger.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, come the said Complainants by
46 their solicitor and file in this cause the affidavit of C. H. Granger, which said affidavit is in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

C. H. Granger, being first duly sworn, deposes and says:

That he is a citizen of the State of Michigan, and a member of the firm of G. W. Granger & Company, manufacturers' agents and merchandise brokers, doing business at 159 Jefferson Avenue in the City of Detroit and County and State aforesaid; that the nature of the business of said firm of G. W. Granger & Company is the selling and distributing of food products to grocery dealers; that for several months prior to the date hereof, the said firm of G. W. Granger & Company have had in their possession and offered for sale and exposed for sale and sold, and are now offering for sale, exposing for sale and selling, at their said place of business, in the City of Detroit, aforesaid, certain brands of syrup, manufactured and packed, as affiant is informed and believes, by the D. B. Scully Syrup Company, of the City of Chicago, in the State of Illinois, being a brand of syrup known as "Triumph Syrup" and labeled as follows:

"Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

Syrup

47 Packed by
D. B. Scully Syrup Co.
Chicago."

and a brand of syrup known as "Westmoreland Syrup" and labeled:

"Westmoreland

A
Blend
of
Pure Maple Syrup
and
Pure Rock Candy
Syrup

Syrup

Canned only by
D. B. Scully Syrup Co.
Chicago."

and that said labels on said two brands of syrups were the only labels of any kind on said syrups and have been at all of said times, and are now, conspicuously placed upon the packages in which said syrups have been and are now being offered for sale, exposed for sale and sold in the State of Michigan, as aforesaid, and so placed on the packages containing said syrups as to be at all times easily discernible and read.

Affiant further says that said brands of syrups, labeled as aforesaid, have been in the possession of said G. W. Granger & Company, in the said City of Detroit, and offered for sale, exposed for sale and sold, in the State of Michigan, to the knowledge of A. C. Bird, State Food Commissioner of the State of Michigan, and John Munn, as inspector in the employ of the State Food Department of the State of Michigan, since about the middle of the month of October,
48 1906; and that about the latter part of the month of November, 1906, affiant was verbally notified by said Munn, State Food Inspector, that said "Triumph Syrup" was improperly labeled, said notification being the first said Granger & Company had received from said Food Commissioner or any of his inspectors that said syrups were improperly labeled.

Affiant further says that on or about the 10th day of December, 1906, a certain Mr. H. Blackadder, doing business as a grocer at 14th Street & McGraw Avenue, in the said City of Detroit, who had previously purchased a quantity of said "Triumph Syrup" from said Granger & Company, told said Granger & Company over the telephone that he did not feel like taking a chance on selling said syrup, as he had been notified by the deputy food commissioner not to sell said brand of syrup; that said Granger & Company explained to said Blackadder that he would be fully protected by the D. B. Scully Syrup Company in selling said syrup, but that said Blackadder said he was afraid to make himself liable to prosecution by selling said syrup, and would not take the chance and would discontinue selling the same, and would return the goods aforesaid he had on hand; and that on said date said Granger & Company notified the said D. B. Scully Company of said facts regarding said Blackadder.

Affiant further says that on or about said 10th day of December, and for the space of two weeks or longer, said Granger & Company received notices from all of their customers in the City of Detroit aforesaid selling said brands of syrup, to-wit, the following firms:

49

Seilaff & Son
George Granzow
H. Blackadder
J. Hallock
J. L. Hudson
J. Redemacher
Otto Goeschel
A. Rommack
Pardridge & Blackwell
Gallagher Bros.
G. R. McMillan.

that said "Westmoreland Syrup," or said "Triumph Syrup," or both, as the case happened to be, had been condemned by the State Food Commissioner or his inspectors, said customers so informing said Granger & Company at about the time each customer was notified, respectively, by said Food Commissioner or said food inspectors, and a number of said customers notified said Granger & Company that they declined further to handle or carry said brands of syrup as they did not want to oppose the orders and directions of said A. C. Bird.

Affiant further says that on or about the 17th day of December, 1906, the said A. C. Bird, State Food Commissioner, personally called at the office of said Granger & Company in the said City of Detroit and told affiant that he, said Bird, had instructed his deputies to condemn the aforesaid brands wherever found, and had told his deputies to tell the grocers to clear their shelves of the aforesaid brands of syrups, and that if the shelves were not cleared and the goods were further exposed for sale, they, said grocers, would be prosecuted.

Affiant further says that at the time said A. C. Bird, State Food Commissioner, called at the office of said Granger & Company, as aforesaid, and talked with affiant, said Granger & Company then and there had in their possession with intent to sell in the State
50 of Michigan, and were then and there offering for sale and exposing for sale, said "Westmoreland Syrup" and said "Triumph Syrup" as hereinbefore set forth; and that said facts were then and there brought to the attention of and made known to the said A. C. Bird, State Food Commissioner; and affiant further says that he, said affiant, on behalf of said Granger & Company and said D. B. Scully Syrup Company then and there requested said A. C. Bird, State Food Commissioner, to start a prosecution against said Granger & Company for then and there having in possession with intent to sell in Michigan, offering for sale and exposing for sale in the State of Michigan, and for having sold in the State of Michigan, both of said brands of Syrups labeled as aforesaid, if he, said Food Commissioner considered them illegal, in order that the Courts of the State of Michigan might pass upon the legality of said labels and said syrups and establish the guilt or innocence of said Granger & Company, and the said D. B. Scully Syrup Company, instead of annoying the customers and hurting the business of said Granger & Company and the said D. B. Scully Syrup Company; but that the said C. A. Bird then and there refused to start said prosecution against said Granger & Company, stating as a reason that said Granger & Company were not the ones he wanted to get, but that he would like to bring suit against the said D. B. Scully Syrup Company, but could not do so on account of said Scully Syrup Company being a non-resident of the State of Michigan; and stating as a further reason for not prosecuting said Granger & Company, as aforesaid, that if said prosecution was started the said D. B. Scully Syrup Company would defend the same and by carrying the case into the courts, might gain immunity from further prosecution until
51 said case against said Granger & Company would be decided by the Courts; and affiant further says that said A. C. Bird, State Food Commissioner, then and there stated that he would not allow or permit the aforesaid brands of syrups, labeled as aforesaid, to be sold in the State of Michigan, and that said goods were not what they were represented to be by the said labels; and that in some instances in which tests had been made, said syrups were found to contain less than two per cent. of maple syrup and in some instances no maple syrup whatever.

And affiant further says that he is informed and believes that said A. C. Bird has not since said date last aforesaid started any prosecutions against any person for selling or offering for sale either or any of said two brands of syrups labeled as aforesaid, but on the contrary, as affiant is informed and believes, said A. C. Bird has persistently refused to bring any such prosecutions.

Affiant further says that as a direct result of the said A. C. Bird, State Food Commissioner and said food inspectors, in telling said grocers and ordering said grocers, as affiant is informed and believes,

that said brands of syrups were condemned and illegal and to take the same off their shelves and send them back to said Granger & Company, said Granger & Company have received the following returned goods:

From J. H. Hallock:

3 cans of "Westmoreland Syrup," each of about the size of ¼ gallon.

9 bottles of "Triumph Syrup," each of about the size of 1/5 of a gallon.

52 46 bottles of "Triumph Syrup," each of about the size of ½ pint.

From H. Blackadder:

10 bottles of "Westmoreland Syrup," each of about the size of 1 quart.

42 bottles of "Triumph Syrup," each of about the size of ½ pint. and that all of said goods were at the time of their return, and have been at all the aforesaid times, labeled as hereinbefore set forth and explained, and in no other manner.

Affiant further states that all of said customers are threatening to return all of said brands of syrups now in their possession to said Granger & Company, and are refusing to pay said Granger & Co. the value of said syrups and are refusing to sell the same; all, as affiant is informed and believes, by reason of the said acts of said food commissioner and said food inspectors; and that said Granger & Company now have outstanding in the hands of said customers large quantities of said brands of syrups, which said customers have purchased in good faith and which said Granger & Company have sold them in good faith, but the value and purchase price of which said customers refuse to pay said Granger & Company to the amount of about $450.00.

Affiant further says that among the said customers of said Granger & Company are embraced some of the largest stores in the City of Detroit, particularly the said J. L. Hudson, Pardridge & Blackwell & G. R. McMillan; and that said firms have been in a position, and are now in a position, to sell and dispose of large quantities of said brands of syrups, labeled as aforesaid, and to rapidly introduce said brands to the consuming public of the said City

53 of Detroit.

And affiant further says that said brands of syrups gave the said customers of said Granger & Company good satisfaction, and that the people who purchased them for consumption were well pleased with them, and that said customers of Granger & Company would like to handle and sell said brands of syrups but for the actions of said food Commissioner, and said food inspectors, as above set forth and explained.

Affiant further says that the demand for syrups of all kinds in the month of December and the winter months of the year — than at any other time; and that said Granger & Company could sell and

can sell more of the said brands of syrups during the month of December and the winter months of the year than at any other time.

And affiant further says that said firm of Granger & Company have now on hand about $575 worth of said two brands of syrups labeled as aforesaid, and that they are unable to dispose of the same on account of the actions of A. C. Bird and his inspectors; and affiant further says that the annual business of said Granger & Company in handling said two brands of syrups amount- to about the sum of $5,000.00.

And further affiant saith not.

C. H. GRANGER.

Subscribed and sworn to before me this 14th day of January, A. D., 1907.

[SEAL.] HARRY E. HUNT,
Notary Public, Wayne County, Michigan.

My Commission Expires March 7/1908.

54 *Affidavit of George O. Tackels and George Granzow.*

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, come the said Complainants by their solicitor and file in this cause the affidavit of George O. Tackels and George Granzow, which said affidavits are in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

George Granzow, being duly sworn, deposes and says:

That he is in the retail grocery and meat market business at 889 Grand River Avenue, Detroit, Michigan, and that on or about December 15th, 1906, a person, who claimed to be the State Food Inspector representing the State Dairy and Food Commissioner Bird of the State of Michigan, — into affiant's store and examined the label on the bottles of the "Triumph" Brand Syrup that were exposed for sale in the said affiant's place of business, and that said State Food Inspector told affiant that such label was illegal under the Laws of the State of Michigan.

Affiant further says that said "Triumph" Brand Syrup, so handled by said affiant, found sale, and affiant is informed and believes that said "Triumph" Brand Syrup gives universal satisfaction to purchasers and customers of said syrup. Affiant further says that all the bottles of the "Triumph" Brand Syrup, which were exposed for sale upon the shelves of affiant's store upon the day that said store was visited by said inspector aforesaid, bore the following label and none other:

55 "Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

Syrup

Packed By
D. B. Scully Syrup Co.
Chicago, Ill."

And further affiant saith not.

Subscribed and sworn to before me this — day of —— A. D., 1907.

Notary Public.

STATE OF MICHIGAN, *County of Wayne, ss:*

George O. Tackels of Detroit, Wayne County, Michigan, being duly sworn, deposes and says,

That he is a Notary Public in and for the said County of Wayne and that on the 15th day of January, A. D. 1907, at the request of one Harry E. Hunt, an attorney in the said City of Detroit, he accompanied said Harry B. Hunt to the place of business of George Granzow, a retail grocer and meat dealer, at 889 Grand River Avenue, in the said City of Detroit for the purpose of obtaining the signature and affidavit of the said George Granzow to the attached statement: That the said Harry E. Hunt presented the attached statement to the said George Granzow, who read the same and in
56 the presence of the said Hunt and this affiant, stated that said statement was true; On being requested, by said Harry E. Hunt, to sign and swear to the annexed statement, said Granzow refused to do so because he stated that he did not care to "mix up with the State Food Inspectors," and in response to inquiries made of him by this affiant, the said George Granzow repeated that the contents of the annexed statement were true, but that he did not want to sign it because, by doing so, he might become involved with the State Deputy Food Inspectors as a result of signing such statement and making such affidavit.

Whereupon this affiant with the said Harry E. Hunt left the premises of said George Granzow and further this affiant saith not.

GEORGE O. TACKELS.

Subscribed and sworn to before me this 15th day of January, A. D., 1907.

[SEAL.] JOHN F. COTTER,
Notary Public, Wayne County, Michigan.

My Commission Expires Nov. 16, 1909.

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Affidavit of Harry E. Hunt in re John Wilke.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, come the said Complainants by their solicitor and file in this cause the affidavit of Harry E. Hunt, which
57 said affidavit is in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

John Wilke, being first duly sworn, deposes and says:

That affiant is now and has been prior to the month of December, 1906, employed as a clerk in the Grocery Store at 962 Gratiot Avenue in the City of Detroit, State of Michigan, which Grocery Store is operated by Otto Goeschel, of Detroit, Michigan.

Affiant further says that on or about December 21st, 1906, two men claiming to be inspectors representing State and Dairy Food Commissioner A. C. Bird, of the State of Michigan, came into said Store where affiant is employed, and upon observing some bottles of "Triumph" Syrup upon the shelves in aforesaid store, said two inspectors told affiant that said syrup was illegally labeled, and that he, the affiant, must cease selling said syrup.

In obedience to said order of said two food inspectors, said affiant has quit offering for sale and selling said "Triumph" Syrup.

Affiant further says that the "Triumph" Brand of Syrup, which was exposed for sale upon the shelves of aforesaid Store upon the day that said Store was visited by said inspectors aforesaid bore the following label and none other:

"Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

58 Syrup

Packed By
D. B. Scully Syrup Co.
Chicago."

And further affiant saith not.

Subscribed and sworn to before me this — day of —— A. D., 1907.

Notary Public.

STATE OF MICHIGAN, *County of Wayne, ss:*

Harry E. Hunt of Detroit, Michigan being duly sworn deposes and says that he is a Notary Public in and for said county; that on the

14th day of January, A. D. 1907, at the request of one, B. Koepke, he accompanied the said Koepke to the retail grocery and saloon located at the corner of Mack and Michigan Aves. in the City of Detroit, operated by one, Otto Goeschel, of Detroit, Michigan, wherein is employed in the capacity of clerk, one, John Wilke.

Deponent further says that he was present and saw the said Koepke hand to the said John Wilke, the annexed form of statement in the form of an affidavit, which the said John Wilke thereupon read and pronounced to be correct and in conformity with the facts in every particular.

Deponent further says that when the said Koepke then requested
the said John Wilke to sign the said statement and be sworn,
59 the said Wilke refused to do so, stating *on* the ground for his
refusal that he did not care to mix in the matter and could see no reason why he should sign the affidavit, whereupon deponent and the said Koepke left the said store and further deponent says not.

HARRY E. HUNT.

Subscribed and sworn to before me, this 14th day of January, A. D., 1907.

[SEAL.] THOS. W. WARD,
Notary Public, Wayne County, Michigan.

My Commission expires Dec. 6th, 1907.

Second Affidavit of George O. Tackels.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, come the said Complainants by their said solicitor and file in this cause the second affidavit of George O. Tackels, which said affidavit is in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

A. Rommeck, being first duly sworn, deposes and says:

That he is now and has been prior to the month of December, 1906, in the Retail Grocery business at the corner of Columbia and
Brush Streets in the City of Detroit, State, of Michigan; and
60 that on or about December 18th, 1906, a person introducing himself as State Food Inspector, John Munn, by a card reading:

"Phone Main 2251
State Dairy and Food Department
525 Majestic Bldg.,
Detroit, Mich.

Presented by
JOHN MUNN, *Inspector.*"

called on affiant at affiant's said store, and, upon seeing upon affiant's shelves a number of bottles exposed for sale, which were labeled "Triumph" Syrup, Manufactured by the D. B. Scully Syrup Co.,

Chicago," said Inspector Munn told affiant that said brand of "Triumph" Syrup was illegally labeled, as said "Triumph" Syrup contained only a very slight trace of Maple. Said Inspector Munn condemned the bottles of "Triumph" Syrup carried in stock by affiant, and said Inspector Munn further told affiant to take the bottles which were labeled "Triumph" Syrup from the shelves, and warned affiant not to sell any more of said "Triumph" Brand Syrup, and told affiant to return same to G. W. Granger & Co., from whom said syrup had been purchased.

Affiant further says that said Inspector Munn also inspected the labels on the "Westmoreland" Brand of Syrup canned by the D. B. Scully Syrup Co., Chicago, Illinois, and told affiant that said labels on said "Westmoreland" Syrup were O. K.

Affiant further says that in obedience to the order of State Food Inspector Munn, affiant took the bottles of "Triumph" Brand Syrup from the shelves, but after affiant had had a talk over the
61 telephone with G. W. Granger & Co., he, the affiant, put said bottles of "Triumph" Syrup back on the shelves where said bottles are now exposed and offered for sale *sale.*

Affiant further says that the "Triumph" Brand of Syrup and the "Westmoreland" Brand of Syrup, which were exposed for sale upon the shelves of said affiant's store upon the day that said store was visited by said Inspector Munn bore the following labels and none other:

"Westmoreland

A
Blend
of
Pure Maple Syrup
and
Pure Rock Candy
Syrup

Syrup

Canned only by
D. B. Scully Syrup Co.
Chicago."

"Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

Syrup

Packed By
D. B. Scully Syrup Co.
Chicago."

Affiant further says that he wants to avoid litigation and
62 trouble with the State Food Commission, and further saith not.

Subscribed and sworn to before me this — day of —— A. D., 1907.

Notary Public.

STATE OF MICHIGAN, *County of Wayne, ss:*

George O. Tackels of Detroit, Wayne County, Michigan, being duly sworn, deposes and says,

That he is a Notary Public in and for the said County of Wayne; that on the Fifteenth day of January, A. D., 1907, at the request of Harry E. Hunt, an Attorney of the said City of Detroit, he went with the said Harry E. Hunt to the place of business of A. Rommeck, a grocery dealer at the corner of Columbia and Brush Streets in the said City of Detroit for the purposes of obtaining the affidavit of the said A. Rommeck; that the said A. Rommeck read the attached statement and stated to this affiant and the said Harry E. Hunt that said statement was true in every particular, and on being requested to sign and swear to said statement said A. Rommeck refused to do so on the ground that he did not wish to do anything to cause the State Food Inspectors to be unfriendly toward him as they could if unfriendly toward him, cause him considerable trouble and annoyance, and he feared that they might do so if he signed and swore to the attached statement: Said A. Rommeck further stated that he
63 feared by so signing this statement, he would become involved in litigation himself, and that while the statement was true in every particular, he did not care to become involved in litigation himself.

And thereupon this affiant together with the said Harry E. Hunt left the premises of the said A. Rommeck, and further this affiant saith not.

GEORGE O. TACKELS.

Subscribed and sworn to before me this 15th day of January, A. D., 1907.

[SEAL.] JOHN F. COTTER,
Notary Public, Wayne County, Mich.

My Commission Expires Nov. 16, 1909.

Second Affidavit of Harry E. Hunt.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, come the said Complainants by their said solicitor and file in this cause the second affidavit of Harry E. Hunt, which said affidavit is in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

John E. Gallagher, being first duly sworn, deposes and says:
64 That he is a member of the firm of Gallagher Brothers, and that said firm is now engaged in the retail grocery and

liquor business at Michigan & 17th St. in Detroit, Michigan, and that during the month of December, 1906, and for some time prior thereto, said firm had been handling and selling the "Triumph" Brand Syrup, manufactured by D. B. Scully Syrup Co., Chicago, Ill. That said firm of Gallagher Bros. purchased said brand of syrup from G. W. Granger & Co., Detroit, Mich., who are handling said brand of Syrup.

Affiant further says that some time during the month of December, 1906, two State Food Inspectors representing State Dairy Food Commissioner A. C. Bird of the State of Michigan, called at affiant's place of business and inspected the labels upon said "Triumph" Brand of Syrup, and said inspectors told affiant that said labels aforesaid were illegal.

Affiant further says that said inspectors made no test or analysis of any of the said Brand of Syrup contained in the affiant's store at any time, and did not demand or take any samples of said syrup with them.

Affiant further says that on December 21st, 1906, he received the following letter from State Dairy and Food Commissioner A. C. Bird.

Michigan Dairy and Food Department, Lansing

A. C. Bird, Commissioner. C. C. Lillie, Deputy Commissioner.
Floyd W. Robinson, State Analyst.

DETROIT, *Dec.* 21, 1906.

Gallagher Bros., Detroit, Mich.

GENTLEMEN: You are hereby notified that the maple
65 syrup bearing the name and address of the D. B. Scully Syrup Co. of Chicago, Illinois, as manufacturers, and which you have in stock must be removed from sale in this State until properly labeled.

You will kindly write me by return mail with reference to your position in this matter.

Very truly yours,
(Signed) A. C. BIRD,
State Dairy and Food Commissioner.

Affiant further says that he did not answer said letter, but that he has decided to discontinue the sale of said "Triumph" Brand of Syrup for the reason that he does not desire to be drawn into any litigation with the State Dairy and Food Commission.

Affiant further says that the "Triumph" Brand of Syrup, which was exposed for sale upon the shelves of said firm of Gallagher Bros. upon the day that said store was visited by said inspectors, aforesaid, bore the following label and none other:

"Triumph

A Delicious
Blend of Pure
Maple Syrup
And Pure Rock
Candy Syrup

Syrup

Packed By
D. B. Scully Syrup Co.
Chicago."

And further affiant saith not.

—— ——

66 Subscribed and sworn to before me this — day of ——, A. D., 1907.

—— ——,
Notary Public.

STATE OF MICHIGAN, *County of Wayne, ss:*

Harry E. Hunt, of Detroit, Michigan, being duly sworn, deposes and says that he is a Notary Public in and for said County; that on the 14th day of January, A. D., 1907, at the request of one, B. Keopke, he accompanied the said Keopke to the retail grocery and saloon store located at the corner of Michigan Ave. and 17th Streets in the said City of Detroit, conducted and owned by one, John E. Gallagher;

Deponent further says that he was present and saw the said Keopke hand to the said Gallagher the annexed statement in the form of an affidavit, which the said Gallagher thereupon read, and pronounced to be a correct statement and in conformity with the facts in every particular.

Deponent further says that when the said Koepke requested the said Gallagher to sign said statement and be sworn, said Gallagher refused so to do stating as a ground for his refusal that he was afraid to sign said statement, as the said Pure Food Commissioners were in a position to make him lots of trouble if he did so, and that as he conducted a liquor store in connection therewith, he was under the impression that it would not be wise for him to sign
67 the affidavit; whereupon deponent and said Keopke left the said store and Gallagher, and further deponent saith not.

HARRY E. HUNT.

Subscribed and sworn to before me this 14th Day of January, A. D., 1907.

[SEAL.] M. M. NESBITT,
Notary Public, Wayne County, Michigan.

My Commission expires Oct. 7, 1907.

Affidavit of James McKenzie.

Afterwards, to-wit, and now on this day, that is to say on the 23rd day of January, 1907, come the complainants by their said solicitor and file in this cause the affidavit of James McKenzie, which said affidavit is in words and figures as follows, to-wit:

STATE OF MICHIGAN, *County of Wayne, ss:*

Jas. McKenzie, being first duly sworn deposes and says:

That he is at present and has been prior to December 1st, 1906, employed as manager for G. R. McMillan in Detroit Mich.

Affiant further says that in the early part of December,
68 he the affiant, was verbally notified by a representative of State Food Commissioner Bird that the "Westmoreland" Brand Syrup, manufactured by D. B. Scully Syrup Company, Chicago, Illinois, which had been offered for sale and been sold in the store managed by affiant, was illegally labeled.

Affiant further says that the "Westmoreland" Brand of Syrup, which was exposed for sale upon the shelves of aforesaid store, bore the following label and none other:

"Westmoreland

A
Blend
of
Pure Maple Syrup
And
Pure Rock Candy
Syrup

Syrup

Packed By
D. B. Scully Syrup Co.
Chicago.

Affiant further says that in obedience of such order from aforesaid party and in order to keep out of trouble, affiant has quit selling said "Westmoreland" Brand of Syrup, and further affiant saith not.

JAMES McKENZIE.

Subscribed and sworn to before me this 12 day of January, A. D., 1907.

[SEAL.] G. SAMUEL FIELD,
Notary Public, Wayne Co., Michigan.

My Commission Expires Aug. 11/07.

69 *Order to Show Cause and Proof of Service.*

Afterwards, to-wit, and now on this day, that is to say, on January 30th, 1907, come the said Complainants by their said solicitor and file in this cause a proof of Service and Order to Show Cause, which said Proof of Service and Order to Show Cause is in words and figures as follows, to-wit:

At a session of the Circuit Court of the United States for the Eastern District of Michigan continued and held pursuant to adjournment at the District Court Room in the City of Detroit on Wednesday the Twenty-third day of January in the year one thousand nine hundred and seven.

Present: The Honorable Henry H. Swan, District Judge.

In Equity. No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

On reading the motion for an order to show cause filed herein and embodied in the bill of complaint on file in this cause, and the affidavits filed in this cause upon which said motion is based, why an injunction should not issue out of and from this court restraining the said defendant, Arthur C. Bird, as stated in said prayer, on motion of Thomas E. Lannen, solicitor for the above named complainants;

It is ordered that said defendant, Arthur C. Bird, show
70 cause in this court on the 28th day of January, A. D., 1907, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue against him, the said defendant, as prayed in the said bill of complaint, and that complainants cause to be served on defendant a copy of the bill of complaint and of the notice and the motion for order to show cause why injunction should not issue as prayed, together with copies of the affidavits to be read in support of said motion, forthwith.

(S'g'd) HENRY H. SWAN,
U. S. District Judge.

EASTERN DISTRICT OF MICHIGAN, *Southern Division, ss:*

Wm. H. McKale, being duly sworn deposes and says, that on the 25th. day of January A. D. 1907, he served the within order to show cause on Arthur C. Bird, at Lansing, in said District, by delivering to him personally, a true copy thereof.

WM. H. McKALE.

Subscribed and sworn to before me, this 29 day of January A. D. 1907.

[SEAL.] JNO. H. CHASE,
Notary Public, Ingham Co., Michigan.

Com. Ex. Jan. 25, 1909.

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71 *Subpœna.*

Circuit Court of the United States of America for the Sixth Circuit and Eastern District of Michigan, Southern Division, Sitting in Chancery.

The President of the United States of America to Arthur C. Bird, a citizen of the State and resident of the Eastern District of Michigan:

[SEAL.] Subpœna.

You are hereby commanded to be and appear in the Circuit Court of the United States of America, for the Sixth Circuit and Eastern District of Michigan, sitting in Chancery, before the Judges thereof, at the Circuit Court Room, in the City of Detroit, on the first Monday of March next ensuing, then and there to answer unto a Bill of Complaint exhibited against you as Defendant by Daniel B. Scully and Maurice H. Scully, citizens of the United States, and citizens and residents of the State of Illinois, as Complainants. And this you shall in nowise omit under the penalty of one Thousand Dollars.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 23rd day of January, in the year of our Lord one thousand nine hundred and seven, and the Independence of the United States, the one hundred and thirty-first.

WALTER S. HARSHA, *Clerk.*

MEMORANDUM.—The above named defendant is required to enter his appearance in this suit with the Clerk of this Court, at his office in the City of Detroit, on or before the day on which this Writ of Subpœna is returnable, otherwise the Bill of Complaint in this cause will be taken *pro confesso* against said defendant.

WALTER S. HARSHA, *Clerk.*

72 EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return, that on the 25th day of January, A. D. 1907, I served the within writ on Arthur C. Bird, defendant, within named at the City of Lansing in said District, by delivering to him personally, a true copy thereof, also exhibiting this writ with the seal of the Court impressed thereon, said copy having like memorandum appended thereto as is hereto appended.

MILO D. CAMPBELL,
U. S. Marshal,
By WM. H. McKALE, *Deputy.*

Filed in Clerk's office Jan. 28, 1907.
WALTER S. HARSHA, *Clerk.*

73 *Affidavit of Arthur C. Bird.*

UITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Dairy and Food Commissioner of the State of Michigan, Defendant.

STATE OF MICHIGAN, *County of Ingham, ss:*

Arthur C. Bird, being first duly sworn, deposes and says, that he is the Dairy and Food Commissioner of the State of Michigan, duly appointed, qualified and acting, and that he is the defendant in the above entitled cause.

Deponent further says that, prior to the institution of this proceeding, it came to his knowledge that a large amount of syrup labeled a blend, compound or mixture of maple syrup and
74 some other syrup, and which contained but a very small percentage of maple syrup, was being sold and exposed for sale in this State; that he thereupon proceeded to obtain samples of the same, in the manner provided by law, for the purpose of ascertaining whether or not such syrups were in violation of the pure food laws of this State, and that samples thereof were obtained and analyzed by the State Analyst: that, from the analyses so made, it was discovered that said syrups so labeled as blends of pure maple syrup and other pure syrups, if they contained any maple syrup at all, contained but a very small percentage thereof, to-wit, not over three per cent., and that many of said syrups so labeled contained no maple syrup whatever, but were merely flavored with maple flavoring.

Deponent further says that, prior to the institution of this proceeding, he caused to be procured, in the manner provided by law, samples of the "Westmoreland" and "Triumph" brands of syrups prepared and sold by said complainant and labeled "Westmoreland (a blend of pure maple syrup and pure rock candy syrup) Syrup! Canned only by D. B. Scully Syrup Co. Chicago." and "Triumph (a delicious blend of pure maple syrup and pure rock candy syrup) Syrup. Packed by D. B. Scully Co. Chicago," and caused an analysis thereof to be made by Floyd W. Robinson, State Analyst; that the said Floyd W. Robinson, State Analyst, reported to this deponent that the analysis so made by him showed that the said "Westmoreland" and "Triumph" brands of syrup contained not over three per cent. of maple syrup; and also reported to this dependent that a syrup containing ninety-seven per cent. of pure rock candy syrup and but three per cent. of maple syrup would be practically colorless,

and that the said brands of syrup were a rich brown color, the color of pure maple syrup.

75 Deponent further says that it was and is his opinion that a syrup containing but three per cent. of maple syrup and ninety-seven per cent. of some other syrup is not legally a blend of "pure maple syrup" and some other syrup; and that a syrup labeled "a delicious blend of pure maple syrup and pure rock candy syrup" which contains but three per cent. of maple syrup and is of a rich brown color, the color of pure maple syrup, either contains artificial coloring matter and is therefore adulterated, or does not contain pure rock candy syrup.

Deponent further says that he personally and through his Inspectors, advised all dealers in this State in such syrups as were in his opinion improperly labeled or adulterated in violation of the laws of this State, that the sale of all such syrups was unlawful and if the sale thereof were continued it would render them liable to criminal prosecution.

Deponent further says that he instructed his Inspectors that all of such syrups so labeled or adulterated and sold as aforesaid, whether prepared by complainants or any other person, firm or corporation, could not legally be sold in this State, and instructed said Inspectors to notify all dealers that the sale of all such syrups, whether manufactured by complainants or by any other persons, firms or corporations, was illegal; that his said Inspectors have proceeded in accordance with the said instructions and condemned the sale of all such syrups as illegal; and that he, as such Dairy and Food Commissioner, has uniformly proceeded against all such syrups, regardless of whom the manufacturer of or dealer therein might be.

76 Deponent further says that he denies that, as stated in the bill of Complaint filed herein, in ruling that complainant's "Westmoreland" and "Triumph" brands of syrup were being sold in violation of the laws of this State, he did not act in good faith, and denies that in making such ruling and in advising dealers in said syrups in this State that the same were being sold in violation of the laws of the State he was actuated by malice and with desire to ruin the business of complainants in this State; and denies that complainants and their said syrups were singled out by him to be proceeded against, to the exclusion of other manufacturers of syrups and the syrups prepared and sold by them in this State.

Deponent further says that he denies, as stated in said bill of complaint, that it has been his custom and practice, and the custom and practice of his Inspectors, to remove with their own hands complainants' said syrups from the shelves in the stores of dealers where the same are exposed for sale, without the consent and assistance of such dealers; that he has uniformly instructed his Inspectors not to remove any such syrups from the shelves of dealers, and that if any of his Inspectors have removed any of such syrups from the shelves of any dealer, such Inspector was acting without any authority from this deponent, and contrary to his express instructions and direction.

Deponent further says that in all his acts and doings in the premises, in advising dealers in complainants' said syrups personally and through his Inspectors that the sale thereof in this State is unlawful, he acted entirely in good faith and in accordance with his duty under the laws of this State.

77 Deponent further says that he denies that he has refused to institute any criminal prosecutions whatever against dealers in complainants' said brands of syrup, although he has denied the authority of said complainants to dictate to him as to when and against whom such prosecutions shall be instituted; that, pursuant to the laws of this State, it is within his discretion as such Dairy and Food Commissioner, to institute such prosecutions as he may deem advisable, for violations of the pure food laws of the State, and that he is unable to say at this time what prosecutions may be instituted by him against dealers in such syrups.

Deponent further says that it is his duty, under the laws of this State, to investigate all complaints of violations of the laws of the State enacted for the purpose of prohibiing and preventing adulteration, fraud and deception in the manufacture and sale of articles of food and drink, and to take all steps necessary to the enforcement of such laws; and that it is not solely his duty to make complaints for violations of said laws, but that said complaints may be made by any citizen.

And further deponent saith not.

ARTHUR C. BIRD.

Subscribed and sworn to before me this First day of February, A. D. 1907.

L. S. RUSSELL,
Notary Public, Ingham County, Mich.

Commission expires Apr. 12, 1910.

(Filed in Clerk's office Feby. 4th, 1907.
WALTER S. HARSHA, *Clerk.*)

78 *Affidavit of Regularity and of Default.*

Afterwards, to-wit, and now on this day, that is to say on March 7th, 1907, come the said complainants by their said solicitor and file in this Court an Affidavit of Regularity, and of Default, which said Affidavit is in words and figures following, to-wit:

UNITED STATES OF AMERICA:

The Circuit Court *for* the United States for the Eastern District of Michigan. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

STATE OF MICHIGAN, *County of Wayne, ss:*

Harry E. Hunt of Detroit, Mich., being duly sworn, deposes and says that he is of Counsel in the above entitled cause, and makes this affidavit for and on behalf of Thomas E. Lannen, solicitor for complainants;

That due service of the subpœna issued in the above entitled cause has been returned and filed as appears by the return of such service heretofore filed in the office of the clerk of said Court; that the time for the appearance of the said defendant, Arthur C. Bird, in said cause in answer to said subpœna has expired;

That affiant has searched the files and records in said cause in the office of said clerk, and that he could not find that defendant had appeared, and has no reason to believe and does not believe
79 that any such appearance has been entered.

HARRY E. HUNT.

Subscribed and sworn to before me, this 6th day of March, A. D. 1907.

[SEAL.] S. M. W. FRAZER,
Notary Public, Wayne County, Michigan.

My commission expires Sept. 26th, 1908.

Præcipi for Order Pro Confesso.

Afterwards, to-wit, and now on this day, that is to say on March 7th, 1907, come said complainants by their said solicitor and file in said Court a Præcipe for Order *Pro Confesso*, which said Præcipe for Order *Pro Confesso* is in words and figures following, to-wit:

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

80 To Walter S. Harsha, Clerk of said Court.

DEAR SIR: Please enter an order taking the bill of complaint in the above entitled cause as confessed by the said defendant, Arthur Bird, for want of appearing after personal service of the subpœna issued in said cause.

THOMAS E. LANNEN.

Dated Detroit, Michigan, March 7th, 1907.

Order Pro Confesso.

Afterwards, to-wit, and now on this day, that is to say on March 7th, 1907, an Order *Pro Confesso* as to Defendant Arthur C. Bird was duly entered by the Clerk in the Chancery Order book kept in his office, which Order is in words and figures following, to-wit:

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

MARCH 7TH, 1907.

81 On reading and filing due proof of personal service upon the said defendant, Arthur C. Bird, of the Subpœna issued in the above entitled cause on the 25th day of January, A. D. 1907, and the time fixed by law and the practice of this court for the said defendant to appear in said cause, having expired, and it appearing by the affidavit of Harry E. Hunt that the said defendant has not appeared in said cause or caused his appearance to be entered,

On motion of Thomas E. Lannen, solicitor for complainants, it is ordered that the bill of complaint filed in said cause be and the same is hereby taken as confessed against the said defendant, Arthur C. Bird.

WALTER S. HARSHA, *Clerk.*

Order Denying Decree on Pro Confesso.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room in the City of Detroit, on Monday, the Fifteenth day of April, in the year one thousand nine hundred and seven.

Present: The Honorable Henry H. Swan, District Judge.

In Equity. No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY
vs.
ARTHUR C. BIRD.

82 In this cause, the complainants having filed and entered an order *pro confesso*, and now asking for a *pro-confesso* degree thereon, it is by the Court now here ordered that the final decree as prayed be denied for the present, without prejudice to its renewal, and the defendant is granted leave to file motion within one week to set aside the order *pro confesso*.

Order Denying Motion for Injunction and Dismissing Bill.

Afterwards, to-wit, and now on this day, that is to say on April 16th, 1907, an order denying motion for Injunction and dismissing Bill was granted by the Court, a memorandum of which was duly entered in the journal of the proceedings of said Court, which memorandum is in words and figures following, to-wit:

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room, in the City of Detroit, on Tuesday, the Sixteenth day of April, in the year one thousand nine hundred and seven.

Present: The Honorable Henry H. Swan, District Judge.

In Equity. No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY
vs.
ARTHUR C. BIRD.

83 In this cause a motion for preliminary injunction heretofore argued and submitted, after mature deliberation thereon, it appearing satisfactorily to the Court that it has no jurisdiction of this cause, it is ordered, that the motion for a preliminary injunction be denied and that the Bill of Complaint be dismissed for want of jurisdiction.

Opinion.

Afterwards, to-wit, and now on this day, that is to say on April 16th, 1907, an opinion on bill for injunction was duly rendered by the Court, which opinion is in words and figures following, to-wit:—

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

On Bill for Injunction.

Thomas E. Lannen, for Complainants.
John E. Bird, Attorney General, and George S. Law, Assistant Attorney General, for Defendant.

84 SWAN, *J.:*

This is a bill to enjoin defendant, who is described in the bill as the State Food Commissioner of Michigan, from doing certain acts which are charged to be in excess of his authority. On motion of complainants an order to show cause why defendant should not be restrained from a continuance and repetition of like acts pending the hearing of the cause, was issued. This motion was fully argued by counsel for respective parties, and submitted for decision.

The defendant failed to plead, answer or demur to the bill as required by the rules on the rule day and his default was entered thereon. Thereupon complainants applied for a decree under Rule 19 of the General Equity Rules of this court. It seems that defendant's omission to plead was either through inadvertence, or probably because defendant thought no step need be taken in the cause until a decision of the motion for injunction should be had, that being the principal relief sought by the bill, and that no further steps would be taken in the case by complainants as the motion for injunction practically involved the jurisdiction of the court over the matters set forth in the bill.

The motion for final decree upon the *pro confesso* order was denied. Upon examination of the authorities cited upon the arguments had in this cause upon the matters above related, it is clear that the case of Arbuckle *vs.* Blackburn, Dairy and Food Commissioner of Ohio, 113 F. R., 616, (C. C. A.), is conclusive against the jurisdiction of a court of equity over the matters set forth in the bill. It is argued in behalf of complainants that the case at bar is differentiated from that decision of the Court of Appeals in the case just
85 cited. It is not perceived that there is any substantial difference in the facts of the two cases which would exclude the ap-

plication of Arbuckle *vs.* Blackburn. That case is conclusive that this court has no jurisdiction to entertain a suit of this nature, and the only order which can be made in this case, notwithstanding the entry of the order *pro confesso,* is one for a dismissal of the bill for want of jurisdiction.

That order will be entered in this case.

HENRY H. SWAN,
District Judge.

Dated Detroit, April 16th, 1907.

86 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

Petition for Appeal and Assignment of Errors.

To the Honorable the Judges of said Court, in Chancery Sitting:

Your petitioners, Daniel B. Scully and Maurice H. Scully, respectfully represent that there is manifest error committed to the injury of the petitioners by the final Decree entered in said cause on the Sixteenth Day of April, A. D., 1907, dismissing this suit and the Bill of Complaint herein for want of jurisdiction, and your petitioners file herewith the following assignment of errors in that behalf, to-wit:

1. The Circuit Court erred in dismissing this cause and the Bill of Complaint herein for want of jurisdiction.

2. The Circuit Court erred in dismissing this cause and the Bill of Complaint herein for want of jurisdiction on the ground that this cause was in effect a suit against the State of Michigan within
87 the Eleventh Amendment to the Constitution of the United States, and that, therefore, a Federal Court had no jurisdiction of this cause.

3. The Circuit Court erred in dismissing this cause and the Bill of Complaint herein under Section Five of the Act of Congress Approved March Third, 1875, on the Court's own motion and without notice to either of the parties to said cause or their attorneys, and in their absence and without their knowledge.

4. The Circuit Court erred in dismissing this cause and the Bill of Complaint herein for want of jurisdiction, on the Court's own motion and without notice to either of the parties to said cause, or their attorneys, while a motion on behalf of defendant to set aside the order taking the Bill *pro confesso* entered herein and to be

granted leave to plead, answer or demur to said Bill was pending and undisposed of in this cause.

Wherefore your petitioners, considering themselves aggrieved, pray an order granting an Appeal from said final Decree to the Supreme Court of the United States, on the question of jurisdiction of this Court, as authorized by Section Five of the Act of Congress of the United States, Approved March Third, 1891, upon the filing by your petitioners of their bond in a penal sum to be hereafter fixed by this Court and the approval of said Bond of this Court.

And your petitioners present herewith a certificate to be signed by the Court, certifying the question of the jurisdiction of this Court in this cause to the Supreme Court of the United States for
88 decison, in accordance with Section Five of the said Act of Congress Approved March Third, 1891, as aforesaid.

And your petitioners will ever pray, etc.

DANIEL B. SCULLY,
MAURICE H. SCULLY,
By THOMAS E. LANNEN,
Their Solicitor.

THOMAS E. LANNEN,
Solicitor for Petitioners.

Filed in Clerk's office April 29, 1907.
WALTER S. HARSHA, *Clerk.*

89 *Order Allowing Appeal.*

At a Session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room in the City of Detroit on Monday the Twenty-ninth day of April, in the year one thousand nine hundred and seven.

Present: The Honorable Henry H. Swan, District Judge.

In Equity. No. 3723.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

Upon consideration of the petition for appeal to the Supreme Court of the United States filed herein by Daniel B. Scully and Maurice H. Scully, complainants in said cause, it is ordered that said appeal be granted, bond therefor in the penalty of two hundred and fifty dollars to be executed and filed in and approved by this Court within ten days from this date.

This appeal is granted upon the question of the jurisdiction of this Court over the matters in controversy in this suit.

90 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

Certificate.

A final Decree having been entered herein on the 16th day of April, 1907, dismissing this suit and the Bill of Complaint therein for want of jurisdiction:

Now, therefore, this Court, in pursuance of the Second Paragraph of the Fifth Section of the Act of Congress, Approved March 3rd, 1891, and entitled: "An Act to establish Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," hereby certifies that said final Decree dismissing this suit and the Bill herein was made and entered by the Court of its own motion and without notice to any of the parties to this suit or their attorneys, except that the question of jurisdiction was argued on the motion for a preliminary injunction, it appearing to the Court from the face of the Bill that this suit is, in effect, a suit against the State of Michigan, within the meaning of the Eleventh Amendment to the Constitution of
91 the United States, and that, therefore, this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of a Federal Court.

And this Court further certified that it entered said final Decree dismissing this suit and the Bill herein on its own motion and without other notice than as aforesaid, because this Court was, and is, of opinion that it should dismiss this suit and the Bill herein under the Eleventh Amendment to the Constitution of the United States and under the Fifth Section of the Act of Congress Approved March 3rd, 1875, and entitled: "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes;" and this Court certifies that it dismissed this suit and the Bill herein for want of jurisdiction under said Amendment of the Constitution of the United States and said last mentioned Act of Congress and the said Fifth Section thereof.

And this Court hereby certifies to the Supreme Court of the United States for decision the question of jurisdiction alone of this Court over this cause, as follows:

Is this Court without jurisdiction of this cause because this is a

suit against the State of Michigan within the meaning of the Eleventh Amendment to the Constitution of the United States?

Detroit May 2, 1907.

HENRY H. SWAN,
District Judge.

Filed in Clerk's office May 2nd, 1907.
WALTER S. HARSHA, *Clerk.*

92 *Bond on Appeal.*

Know all men by these presents, That we Daniel B. Scully and Maurice H. Scully, as principals and George W. Granger, as surety, are held and firmly bound unto Arthur C. Bird, in the full and just sum of two hundred and fifty dollars to be paid to the said Arthur C. Bird or his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of May in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a session of the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, in a suit pending in said Court, between Daniel B. Scully and Maurice H. Scully, Complainants, and Arthur C. Bird, Defendant, a decree was rendered against the said Daniel B. Scully and Maurice H. Scully, and the said Daniel B. Scully and Maurice H. Scully having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the Decree in the aforesaid suit, and a citation directed to the said Arthur C. Bird citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, That is the said Daniel B. Scully and Maurice H. Scully shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

93 DANIEL B. SCULLY. [SEAL.]
MAURICE H. SCULLY. [SEAL.]
GEORGE W. GRANGER. [SEAL.]

Sealed and delivered in presence of—
RAYMOND J. LeBEAU,
Witness to signatures of Daniel B. Scully and Maurice H. Scully.
ELMER W. VOORHEIS,
Witness to signature of George W. Granger.

Approved by
HENRY H. SWAN,
U. S. District Judge.

Filed in Clerk's office May 6th, 1907.
WALTER S. HARSHA, *Clerk.*

94 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Defendant.

Præcipe for Record.

The Clerk of said United States Circuit Court is hereby directed to prepare a transcript of the following matters and things of record in said cause for appeal to the United States Supreme Court on the question of jurisdiction only, under the order heretofore entered, to-wit:

(1) The Bill of Complaint, with exhibits thereto attached and filed herewith.

(2) Subpœna directed to Arthur C. Bird, with Clerk's memorandum thereon of date on which to enter appearance, with return thereon showing service of subpœna and memorandum on said Arthur C. Bird.

(3) Order on defendant Arthur C. Bird to show cause, entered January 23, 1907, with return thereon showing service on said Arthur C. Bird.

(4) Affidavit of default and of regularity, dated March 6, 1907.

(5) Præcipe for order *pro confesso*, dated March 7, 1907.

(6) Order taking Bill of Complaint *pro confesso*.

95 (7) Order entered April 15, 1907, denying complainants' motion for decree *pro confesso* for the present, without prejudice to its renewal, and granting leave to defendant to file motion within one week to set aside the order *pro confesso*.

(8) Final Decree, entered April 16, 1907, dismissing the suit and the bill herein for want of jurisdiction.

(9) Opinion of the Court on dismissal of said suit, and the bill herein.

(10) Petition for Appeal to the United States Supreme Court, solely on the question of jurisdiction, and Assignment of Errors.

(11) Order allowing Appeal to the United States Supreme Court solely on the question of jurisdiction.

(12) Certificate of the Court certifying question of jurisdiction alone to the United States Supreme Court for decision.

(13) Appeal Bond with approval of the Court thereon.

(14) Citation directed to Arthur C. Bird citing him to the United States Supreme Court, with return thereon showing service on said Arthur C. Bird.

The above being a complete transcript of all the pleadings, orders and other matters or record in said cause.

THOMAS E. LANNEN,
Solicitor for Complainants Daniel B. Scully and Maurice H. Scully.

Dated, May 15, 1907.

Filed in Clerk's office May 15th, 1907.
WALTER S. HARSHA, *Clerk.*

96 *Defendant's Præcipe for Record.*

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants,
vs.
ARTHUR C. BIRD, Dairy & Food Commissioner of the State of Michigan, Defendant.

SIR: You will please take notice that you are required to include in the transcript of the record to be returned by you to the Supreme Court of the United States, upon the appeal of said complainant to said court, the affidavits filed by said complainants in support of their application for a temporary injunction, together with the affidavit filed by the defendant, Arthur C. Bird, in opposition thereto.

Dated this 21st day of May, A. D. 1907.

ARTHUR C. BIRD,
Defendant.
JNO. E. BIRD,
Attorney General of Michigan,
Solicitor for said Defendant.
GEO. S. LAW,
Of Counsel.

To Walter S. Harsha, Clerk of said Court.

(Filed in Clerk's Office May 22, 1907.
WALTER S. HARSHA, *Clerk.*)

97 UNITED STATES OF AMERICA, *ss:*

To Arthur C. Bird, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a Claim of Appeal, filed in the

Clerk's Office of the Circuit Court of the United States for the Eastern District of Michigan, wherein Daniel B. Scully and Maurice H. Scully, are Complainants, and you are defendant, to show cause, if any there be, why the judgment rendered against the said Complainant as in the said Claim of Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of May, in the year of our Lord one thousand nine hundred and seven.

HENRY H. SWAN,
United States District Judge for the Eastern District of Michigan.

Service accepted this — day of May, 1907.

[Endorsed:] 39. 3944. The Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity. 5/8/07 2.30 P. M. D. D. S. Daniel B. Scully and Maurice H. Scully *vs.* Arthur C. Bird. Citation. Received May 18, 1907. Attorney General. Filed in Clerk's Office May 29, 1907. Walter S. Harsha, clerk. Thomas E. Lannen, Solicitor for Complainants, 1027 First Nat. Bank Bldg., Chicago, Illinois.

EASTERN DISTRICT OF MICHIGAN, *Southern Division, ss:*

William H. McKale, being duly sworn deposes and says that on the 27th day of May, A. D. 1907, he served the within citation on Arthur C. Bird, at Lansing, in said District, by delivering to him personally, a certified copy thereof.

WM. H. McKALE.

Subscribed and sworn to before me, this 27th day of May, A. D. 1907.

JNO. H. CHASE,
Notary Public, Ingham Co., Michigan.

[Seal John H. Chase, Notary Public, Ingham Co., Mich.]

Com. Ex. Jan. 25, 1909.

98 *Certificate.*

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

No. 3944.

DANIEL B. SCULLY and MAURICE H. SCULLY, Complainants and Appellants,
vs.
ARTHUR C. BIRD, Defendant and Appellee.

I, Walter S. Harsha, Clerk of the Circuit Court of the United States for the Eastern District of Michigan, do hereby certify and return to the claim of appeal of the above named complainant, on file in the above entitled cause; that the above and foregoing record contains all of the papers filed and proceedings had in said court in said cause, according to the "Praecipe for record" filed by the complainants' solicitor May 15th, 1907; and in addition thereto, the affidavits filed by complainants in support of their application for temporary injunction, together with the affidavit of Arthur C. Bird in opposition thereto, as required by the praecipe filed by the defendant's solicitor May 22nd, 1907; that said transcript is a true copy of such files and records and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this 29th day of May, in the year of our Lord one thousand nine hundred and seven, and the Independence of the United States of America the one hundred and thirty-first.

WALTER S. HARSHA, *Clerk.*

[Seal of the Circuit Court, Eastern District of Michigan.]

99 [Endorsed:] Supreme Court of the United States. Daniel B. Scully and Maurice H. Scully, appellants, *vs.* Arthur C. Bird, Appellee. Return to Claim of Appeal.

Endorsed on cover: File No. 20,756. E. Michigan, C. C. U. S. Term No. 353. Daniel B. Scully and Maurice H. Scully, appellants, *vs.* Arthur C. Bird. Filed June 6th, 1907. File No. 20,756.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1907.

No. 353.

DANIEL B. SCULLY AND MAURICE H. SCULLY,
Appellants.

vs.

ARTHUR C. BIRD,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

HON. HENRY W. SWAN, JUDGE PRESIDING.

BRIEF AND ARGUMENT FOR APPELLANTS.

STATEMENT OF THE CASE.

This was a bill for injunction filed by Daniel B. Scully and Maurice H. Scully, partners, engaged in the syrup business, under the name of D. B. Scully Syrup Co., against Arthur C. Bird, who is the Dairy and food commissioner of the State of Michigan.

An injunction is prayed for restraining said Bird from doing certain acts alleged to be in excess of his authority as such Dairy and Food Commis-

sioner, but being done by him under color of his said office.

It is alleged in the Bill of Complaint that Bird, without any right or authority under the law so to do, is sending out large numbers of circular letters on his official stationery and over his official signature as food commissioner, to all of complainants' customers, in which letters he warns them that complainants' syrups are illegally labeled and that any one found selling such syrups will be criminally prosecuted. (Rec., 12.) It is also alleged that Bird is sending his food inspectors to complainants' customers to warn them under threats of criminal prosecution not to handle or sell complainants' syrups. (Rec., 11.) Complaint is also made in the bill that these inspectors are, under Bird's directions, forcibly removing such syrups from off the shelves of customers against the wishes of such customers. (Rec., 14.) It is claimed that all of these acts are in excess of Bird's authority as food commissioner and are entirely without warrant of law. (Rec., 19.)

It is further alleged in the bill that complainants' said syrups are composed of a true blend or mixture of pure maple syrup and pure rock candy syrup and contain no other ingredients (Rec., 8-9); that such syrups are lawfully labeled as "a delicious blend of pure maple syrup and pure rock candy syrup," which label complies in all respects with the requirements of the Michigan Pure Food Law. (Rec., 11.) But, notwithstanding that such syrups are legal in every respect, said Bird persists in waging a systematic crusade against the sale of

said syrups by writing said letters and making said threats as aforesaid, with the result that complainants' business in the State of Michigan is being utterly ruined and destroyed.

The bill further alleges that complainants have exhausted every effort to have the courts of Michigan pass upon the legality of their said syrups, but that said Bird has denied them this privilege by absolutely refusing to bring prosecutions against said syrups (Rec., 16-17), although the same are being openly sold to the personal knowledge of said Bird and his inspectors by some of complainants' customers (Rec., 17); that one of said customers specifically asked Bird, when the latter was in his store where such syrups were then being sold, to prosecute such sales, but that Bird flatly refused so to do, saying in substance that he did not care to carry the matter into the courts, for fear complainants might thereby gain some advantage or immunity. (Rec., 17.)

The bill prays for an injunction restraining Bird from doing the acts above complained of (Rec., 21-22), but leaving him at liberty to proceed according to the statutes and laws of the State of Michigan to bring prosecutions against said syrup, or to proceed in any other way authorized by law to discharge the duties of his office. (Rec., 23.)

Upon the filing of the bill, an order to show cause why a preliminary injunction should not issue was entered (Rec., 70) and, on the hearing of that order, defendant appeared and filed his own affidavit denying many of the allegations of the bill upon the merits. (Rec., 73-77.) After argument, the court

took the matter under advisement. Meanwhile the time for defendant to formally enter his appearance expired, and he was defaulted and the bill taken *pro confesso* against him. (Rec., 80-81.) In due course a motion for decree on the bill taken *pro confesso,* was made, whereupon defendant appeared and moved to be allowed to enter a motion to set aside the order *pro confesso,* which leave was granted by the court and the defendant given one week from that date to file said motion, and the court at the same time denied complainants' motion for a decree for the present, without prejudice, however, to its renewal at a later date. (Rec., 82.) This order was entered by the court to afford the defendant an opportunity to prepare and file his formal motion to set aside the order *pro confesso.* Before the expiration of the one week given the defendant to file his said motion, and upon the very next day after the entering of the order granting him leave to file said motion, the court dismissed the bill for want of jurisdiction. (Rec., 83.) The order of dismissal was made by the court of its own motion, without notice to either complainants or defendant, or their attorneys, without their knowledge and in their absence. (Rec., 90-91.) The bill was dismissed by the court under Section 5 of the Act of 1875 (Rec., 91), the court being of the opinion that the bill disclosed upon its face that the suit, being against Bird, who is the dairy and food commissioner of Michigan, was for that reason a suit against the State of Michigan within the meaning of the Eleventh Amendment to the Constitution of the United States, which provides that the judicial

powe[illegible]of the United States shall not extend to controversies between a State and citizens of another state.

The trial court has certified to this court for decision the question of jurisdiction (Rec., 91), and this court is asked to decide whether the trial court was in error in dismissing the bill for want of jurisdiction, and whether the present suit is, in effect, a suit against the State of Michigan within said Eleventh Amendment to the Constitution.

SPECIFICATIONS OF ERROR.

The Circuit Court erred:

I.

In holding that the Bill of Complaint disclosed upon its face that this is a suit against the State of Michigan, within the Eleventh Amendment to the Constitution, and dismissing the bill for want of jurisdiction on that ground, and in not holding that this suit was against the defendant, Arthur C. Bird as an individual. (Rec., 86.)

II.

In holding that said defendant, Arthur C. Bird, had not waived his immunity, as a representative of the state, from suit in a Federal Court, by appearing in the cause and by entering his motion for leave to set aside the order *pro confesso*. (Rec., 86.)

III.

In dismissing the Bill of Complaint on the court's own motion under Section 5 of the Act of 1875, said dismissal being made in the absence, and without the consent or knowledge, of complainants, or their attorneys, and before the expiration of the time allowed by the court to defendant to enter his motion to set aside the order *pro confesso*. (Rec., 87.)

IV.

In holding that the question whether this is a suit against the State within the Eleventh Amendment to the Constitution, is a question of jurisdiction, rather than a question of the merits of the case. (Rec., 86.)

BRIEF.

I.

The prohibition of the Eleventh Amendment does not apply where a suit is brought against defendants who, claiming to act as officers of the state, and under color of a statute which is valid and constitutional, but wrongfully administered by them, commit, or threaten to commit, acts of wrong or injury to the rights and property of the plaintiff, or make such administration of the statute an illegal burden and exaction upon the plaintiff.

Bates on Federal Equity Procedure (1901 Ed.), Vol. 1, Sec. 560, Subdivision 4.

Reagan v. *Farmer's Loan & Trust Co.*, 154 U. S., 388.

The prohibition of the Eleventh Amendment does not apply where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the Government. In this class of cases, the defendant is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer, to make out his defense, he must show that his authority in law was sufficient to protect him.

Cunningham v. *Macon & Brunswick R. Co.*, 109 U. S., 451.

The state is a political corporate body, can act only through its agents, and can command only by laws. It is necessary, therefore, for a defendant who seeks to substitute the state in his place, to produce a law of the state which costitutes his commission as its agent, and a warrant for his act.

Bates on Federal Court Equity Procedure (1901 Ed.), Sec. 560, Subdivision 8.

Poindexter v. *Greenbow*, 114 U. S., 288.

Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal Courts to maintain a like defense.

Bates on Federal Court Equity Procedure (1901 Ed.), Sec. 560, Subdivision 9.

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 391.

The suit at bar might have been maintained in the state courts of Michigan against said defendant, Arthur C. Bird.

Pratt Food Co. v. *Bird*, 148 Mich., 631 (pp. 633-4); 112 North Western Rep., 701.

The statutes of Michigan confer no authority upon the defendant to do the acts of which complaint is made against him in this case.

Compiled Laws of Michigan, Sec. 4978.

II.

The state can waive its right to immunity from suit in a Federal Court.

Clark v. *Barnard,* 108 U. S., 436.

Any pleading to the merits, or by any informal manner attacking plaintiff's case, is a general appearance and waives such immunity.

2 Ency. Pl. & Pr., 363, and cases there cited.

The obtaining of an extension of time to plead is a general appearance.

2 Ency. Pl. & Pr., 639, and case there cited.

III.

The suit at bar should not have been dismissed under Sec. 5 of the Act of 1875.

Compiled Statutes of United States, Sec. 639.

Farmington v. *Pillsbury,* 114 U. S., 138.

Williams v. *Mattawa,* 104 U. S., 212.

Mattocks v. *Baker,* 2 Fed. Rep., 457.

IV.

The question whether the suit at bar is, in legal effect, a suit against the State is one on the merits of the case, and it was error for the Trial Court to hold that it was a question of jurisdiction, and to dismiss the bill on that account for want of jurisdiction.

Ill. Cent. R. R. Co. v. *Adams,* 180 U. S., 28.

ARGUMENT.

I.

The Eleventh Amendment to the Constitution of the United States is as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The learned circuit judge was of opinion that, inasmuch as the suit at bar is brought against Arthur C. Bird, who is the duly qualified and acting Dairy and Food Commissioner of the State of Michigan, therefore the suit is, in effect, a suit against the State of Michigan, since a state can only act through its duly qualified officers.

We contend that the suit at bar is not, in effect, a suit against the State of Michigan. This contention may be divided into two propositions, as follows:

1. The prohibition of the Eleventh Amendment does not apply where a suit is brought against a public officer who is acting in excess of his authority.

2. The defendant, Arthur C. Bird, in doing the acts complained of in this case, was acting in excess of the authority conferred upon him by law.

The prohibition of the Eleventh Amendment does not apply where a suit is brought against the defendant, who, claiming to act as an officer of the state, and under the color of a statute which is perfectly valid and constitutional, but wrongfully administered by him, commits or threatens to commit acts of wrong and injury to the rights and property of the complainants, or make such administration of the statute an illegal burden and exaction upon complainant.

Bates on Federal Equity Procedure (1901 Ed.), Vol. 1, Sec. 560, subdivision 4.

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S., 388.

A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through its agents, and can command only by laws. It is necessary, therefore, for such defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his acts.

Bates on Federal Equity Procedure, Vol. 1, Sec. 560, Subdivision 8 (1901 Ed.).

Poindexter v. *Greenhow*, 114 U. S., 288.

It may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may in-

voke the jurisdiction of the Federal Courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suit for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal Courts.

> Bates on Federal Court Equity Procedure (1901 Ed.), Sec. 560, Subdivision 9.
>
> *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 391.

The suit at bar might have been maintained in the state courts of Michigan.

> *Pratt Food Co.* v. *Arthur C. Bird*, 148 Mich., 631.

As to the second proposition above, that is, that the defendant, Arthur C. Bird, in doing the acts complained of, exceeded his authority as Food Commissioner, we cite the following extracts from the law of Michigan concerning the duties and authority of the Food Commissioner:

> "It shall be the duty of the Dairy and Food Commissioner to carefully inquire into the dairy and food and drink products and the several articles which are foods or drinks, or the necessary constituents of foods or drinks, which are manufactured or sold or exposed or offered for sale in this state, and he may, in a lawful manner, procure samples of the same and direct the state analyst to make due and careful examination of the same, and report to the commissioner the result of the analysis of all and any of such food and drink products or dairy

products as are adulterated, impure or unwholesome in contravention of the laws of this state; and it shall be the duty of the commissioner to make a complaint against the manufacturer or vendor thereof in the proper county and furnish all evidence thereof, to obtain a conviction for the offense charged. The Dairy and Food Commissioner, or his deputy, or any person appointed by him for that purpose, may make complaint and cause proceedings to be commenced against any person for the enforcement of any of the laws relative to adulterated, impure or unwholesome food or drink, and in such case he shall not be obliged to furnish security for costs, and shall have power, in the performance of his duties, to enter into any creamery, factory, store, sales-room, drug store or laboratory, or place where he has reason to believe food or drink is made, stored, sold or offered for sale, and open any cask, tub, jar, bottle or package containing, or supposed to contain, any article of food or drink and examine or cause to be examined the contents thereof, and take therefrom samples for analysis. The person making such inspection shall take such samples of such article or product in the presence of at least one witness, and he shall, in the presence of said witness mark or seal such sample and shall tender at the time of taking to the manufacturer or vendor of such product, or to the person having the custody of the same, the value thereof, and a statement in writing for the taking of such sample * * *"

Compiled Laws of Michigan, Sec. 4978.

The above quoted law sets forth all the duties of the Food Commissioner in so far as they appertain to adulterated food, and if the defendant's acts in this case are not authorized by the above law then such acts are without authority of any law.

It will be remembered that the defendant, Arthur C. Bird, has been writing and sending broadcast over the State of Michigan, to all of complainants' customers, circular letters of which the following is a sample (Rec., 12-13):

"MICHIGAN
DAIRY AND FOOD DEPARTMENT,
Lansing.

A. C. Bird, Commissioner. C. C. Lillie, Deputy Commissioner.
Floyd W. Robinson, State Analyst.

DETROIT, Dec. 21, 1906.

Gallagher Bros.,
Detroit, Mich.

GENTLEMEN:

You are hereby notified that the MAPLE SYRUP bearing the name and address of the D. B. Scully Syrup Co. of Chicago, Illinois, as manufacturers, and which you have in stock, must be removed from sale in this state until properly labeled.

You will kindly write me by return mail with reference to your position in this matter.

Very truly yours,
(Signed) A. C. BIRD,
State Dairy and Food Commissioner."

We must consider that neither the defendant nor the State Analyst had ever examined or analyzed this syrup which is being so freely condemned; they had taken no samples (Rec., 14); they had not even seen it in most cases, but had learned through other sources that the party written to was a customer of complainant's. Must all the provisions in the above law for the taking of samples, and the safeguarding of the dealers' rights, be held for naught, and the defendant accorded full power under the above law to indulge in free and unrestrained con-

demnation and intimidation to the utter ruin of complainants' business and reputation? We must consider further, that defendant has absolutely refused to bring prosecutions against this syrup (Rec., 18-19), although it is made his unqualified duty to prosecute under the above law, if he believed such syrup to be illegal. The defendant has therefore refused to do the *one* thing it is made his duty to do, and has launched into a series of acts which the law never authorized.

The statute, by expressly and in mandatory terms, directing the commissioner to prosecute all persons selling adulterated goods, impliedly negatives the right of the commissioner to write official letters warning customers that they are violating the law and commanding them to desist. It was never intended that a commissioner should have the right to officially forgive violations of the law. Neither was it contemplated that the commissioner should run an extensive bureau of publicity. If such were the intention there would certainly be some provision in the statute to that effect.

In the case of *Arbuckle* v. *Blackburn*, 113 Fed. Rep., 616, which was a bill for an injunction restraining a food commissioner from bringing criminal prosecutions, the court said (p. 624):

> "What, then is the object of the injunction sought in this case? It is no more or less than to restrain the officer of the State from bringing prosecutions for violations of an act which such officer is expressly charged to enforce in the only way he is authorized to proceed—by bringing criminal prosecutions in the name of the State."

And that is precisely our contention in this case. We concede that Bird has a right to bring criminal prosecutions, but we deny that he has any right to intimidate complainants' customers by writing threatening letters, while at the same time he refuses to bring prosecutions.

Now, while we are on the *Arbuckle* case, we will say that we do not propose to discuss what is therein said in regard to the inability of a court of equity to restrain a state officer, since we consider that question one on the merits of the case, and not, therefore, involved in this appeal. Suffice it to say that the Supreme Court of Michigan has recently held that an injunction will lie against a food commissioner who is condemning lawful goods.

Pratt Food Co. v. *Bird*, 148 Mich., 631.

What is said in the *Arbuckle* case in regard to a suit against a food commissioner being a suit against the State, is confined to suits to restrain criminal prosecutions. This will appear from the following quotation from the opinion:

> "In so far as this action seeks an injunction against respondent from proceeding to enforce by prosecutions the provisions of the statutes of Ohio above cited, the courts of the United States are deprived of jurisdiction by the Eleventh Amendment to the Constitution."

The suit at bar does not seek an injunction against criminal prosecutions (Rec., 18). On the contrary, the defendant's refusal to prosecute is one of the chief grounds of complaint. (Rec., 19.) The prayer of the bill is that Bird be restrained from writing these threatening letters, but that he be left at lib-

erty to bring criminal prosecutions or proceed in any other way authorized by law to discharge the duties of his office. (Rec., 23.)

We submit that the defendant in doing the acts complained of cannot successfully claim to be representing the State of Michigan, since no law of Michigan gives him the right to do the things which he has done. Indeed, that would be a strange law which would constitute one man the sole prosecutor and judge, at whose arbitrary will the good reputation of a citizen's business, which it had taken years to establish, could be forever ruined and destroyed, and that citizen denied an appeal to the courts to establish the legality of his position. The defendant is simply acting as a private citizen, but under the color of his office as Food Commissioner. (Rec., 19.)

II.

The State of Michigan had the right to waive its immunity from suit in a Federal Court.

Clark v. *Barnard*, 108 U. S., 436.

On the hearing of the motion for a preliminary injunction in this case, the defendant appeared, by his counsel, and filed his affidavit in which he denied many of the allegations of the bill of complaint on the merits. (Rec., 73.) His appearance was not limited or special for the purpose of contesting the jurisdiction. We believe that this conduct on defendant's part constituted a waiver of any im-

munity from suit in a Federal Court which the defendant may have possessed by reason of his public office.

Any pleading to the merits, by means of an answer, plea, or by any informal manner attacking plaintiff's case, is a general appearance.

2 Ency. Pl. & Pr., 363, and cases there cited.

The defendant, also after an order *pro confesso* had been entered against him, appeared and asked and obtained leave of court to enter his motion to set aside said order *pro confesso*. (Rec., 82.) In making this motion, his appearance was not limited to a special purpose.

The obtaining of an extension of time to plead is a general appearance. If a party makes a motion in the cause, not limiting his appearance to a specific purpose, he will be held to have appeared generally for all purposes.

2 Ency. Pl. & Pr., 637.

It is a universal rule, which admits of no exception, that, if the court has jurisdiction of the subject-matter, a general appearance gives jurisdiction over the person.

2 Ency. Pl. & Pr., 639, and cases there cited.

We therefore submit that the general appearance of defendant and his taking part in the proceedings amounted to a waiver of the immunity from suit in a Federal Court which the State enjoys, even if it be conceded that the suit at bar is a suit against the State of Michigan.

III.

It will be remembered that the trial court dismissed the bill of complaint of its own motion. We contend that the procedure leading up to, and resulting in, the dismissal of the bill of complaint, was irregular and erroneous. The bill of complaint had been taken *pro confesso* against the defendant, and complainants had made a motion for a final decree upon the bill *pro confesso*, whereupon defendant appeared, by his counsel, and asked the court for leave to file a motion to set aside the order *pro confesso*, which was granted, and the defendant given one week to file such motion. (Rec., 82.) This was on April 15, 1907. On the following day, before the time allowed for the filing of such motion had expired, without notice of any kind to either complainants or defendant, or their attorneys, and in their absence, and without their knowledge, the court, of its own motion, dismissed the bill of complaint herein for want of jurisdiction. (Rec., 82.) The dismissal was entered by the court under Section 5 of the Act of March 3, 1875. (Rec., 90.) The complainants, or their attorney, did not learn of such dismissal until after the order had been duly entered by the court.

We contend that this procedure was irregular and erroneous, and submit the following points and authorities upon that proposition:

1. The complainants should have been notified in some way, and have been given an opportunity to be heard upon the propriety of dismissing the bill of complaint for want of jurisdiction. They, if

afforded the opportunity, might have been able to obviate the jurisdictional objection by amendment of the bill.

2. We think the court should not have dismissed said bill, after having just granted defendant one week in which to file a motion to set aside the order *pro confesso*, the time granted for the filing of such motion not having expired. The progress of the cause and the condition of the record would seem to make such dismissal at that time irregular and erroneous. Besides, it may have forestalled defendant's desire to submit himself to the jurisdiction of the court.

3. The dismissal by the court of its own motion under the Act of 1875 was erroneous in this case because the Act of 1875 was designed to afford the court an opportunity to protect itself against fraudulent and collusive joining of parties to a suit for the purpose of conferring jurisdiction upon a federal court.

Sec. 5, Act of Congress, 1875.

Compiled Statutes of United States, Sec. 629.

Farmington v. *Pillsbury*, 114 U. S., 138.

Williams v. *Nattawa*, 104 U. S., 212.

Mattocks v. *Baker*, 2 Fed. Rep., 457.

The suit at bar presents quite a different case and the method of procedure under the Act of 1875 should not have been resorted to.

IV.

Lastly, we contend that the question whether this is a suit against the State within the Eleventh Amendment to the Constitution, is a question on the merits of the case, and not a question of jurisdiction. We think the trial court was in error in holding that this was a question of jurisdiction and dismissing the bill of complaint for want of jurisdiction.

In the case of *Ill. Cent. R. R. Co.* v. *Adams*, 180 U. S., 28, which was a case brought to restrain Adams, who was the revenue agent of the State of Mississippi, from bringing any suit to collect certain taxes, the court says, on page 37:

> "The question whether this is a suit against the State within the Eleventh Amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to suits against one of the United States by citizens of another state, is also one which we think belongs to the merits rather than to the jurisdiction. If it were a suit directly against the State by name, it would be so palpably in violation of that amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the State, but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the State that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of a motion to dismiss. * * *"

Again, on page 38, the court says:

> "But where the suit is against an individual

by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. * * *"

"But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill, or by other pleadings in the regular progress of the cause, motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case."

And the court finally disposes of the case in the following language (p. 41):

"The decrees of the Circuit Court dismissing the bills in these cases for want of jurisdiction must, therefore, be reversed, and the cases remanded to that court for further proceedings not inconsistent with this opinion."

It will be remembered that in the case at bar the bill alleges that the acts complained of are being done by Bird as a private citizen and not as food commissioner (Rec., 19), and the injunction prayed for is against him as a private citizen, not as food commissioner. Furthermore, the defendant did not raise the alleged jurisdictional question by either plea or demurrer; he did not even make a motion to dismiss for want of jurisdiction, but the trial court, of its own motion, dismissed the bill of complaint for want of jurisdiction. (Rec., 90-91.) We submit that this dismissal was clearly erroneous under the authority of the case last cited.

In conclusion, we wish to say that we have purposely refrained from discussing either the legality of complainants' syrups, or their right to an injunction if such legality is established. We consider these questions to be of the merits of the case, rather than questions of jurisdiction, and we feel confident of our ability to establish both these propositions if given the opportunity for a hearing in the court below.

We therefore ask, on account of the errors urged in this brief, that this case be reversed and remanded to the Circuit Court for further proceedings.

Respectfully submitted.

E. T. Fenwick,
Solicitor for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

NO. 353.

DANIEL B. SCULLY AND
MAURICE H. SCULLY,
Appellants,

ARTHUR C. BIRD,
Appellee.

BRIEF AND ARGUMENT OF THE ATTORNEY GENERAL OF MICHIGAN, FOR APPELLEE.

I.

A decree denying the temporary injunction and dismissing the bill of complaint was the only decree that could be rendered by the Circuit Court.

(a) The decree of the Circuit Court was correct, and was the only decree that could be rendered in the case, under the decision of the Circuit Court of Appeals of the Sixth Circuit in the case of

Arbuckle v. Blackburn, 113 Fed., 616,

and of this court affirming that decision in

Arbuckle v. Blackburn, 191 U. S., 405.

As shown by the statement of that case preceding the report of the opinion of the Circuit Court of Appeals, and by the records and briefs filed in the case in this court, the bill of complaint was there filed by Arbuckle Bros., citizens of the state of New York, against Joseph E. Blackburn, Dairy and Food Commissioner of the state of Ohio, wherein it was alleged that complainants were the manufacturers of a certain preparation known as "Ariosa," and that Blackburn had erroneously construed the Ohio food laws as prohibiting the sale of the same in that state; that he would, unless restrained by the court, widely advertise throughout the state that said preparation was in violation of the laws of the state; that he had menaced and threatened with prosecution dealers and vendors of said preparation for violation of the statute; and further, that he had issued a circular letter to dealers in complainants' said preparation and would, unless restrained, issue other circulars directed against complainants and their products, with the intention to compel complainants and dealers in their said preparation to cease selling and offering the same for sale within the state; and that the acts of the commissioner had irreparably injured the property rights of complainants.

The bill asked that the defendant be enjoined from claiming and stating that complainants' said preparation was in violation of the Ohio statute, and that selling or offering the same for sale was a violation thereof; also from charging complainants or any dealers in their said preparation with violating the statute; also from threatening any dealers in said preparation with prosecution for having the same in their possession or offering the same for sale; and from instituting criminal prosecutions against any one on account of selling, offering for sale or having in his possession the said preparation.

The case was submitted to the Circuit Court upon the ap-

plication of complainants for a temporary injunction. At the hearing upon this application numerous affidavits were produced by complainants tending to show that their preparation was not adulterated within the meaning of the Ohio statute; also affidavits to the effect that the course pursued by the Dairy and Food Commissioner would irreparably injure complainants, and also affidavits tending to show that defendant Blackburn had no property and would be unable to respond in damages for any judgment that might be rendered against him in an action at law.

After a full hearing in the matter the temporary injunction was denied and the bill of complaint dismissed for want of jurisdiction. Thereupon complainants removed the case to the Court of Appeals for the sixth circuit where the decree of the Circuit Court denying the temporary injunction and dismissing the bill of complaint was affirmed, that court holding that so far as the bill sought to restrain criminal prosecutions it was a suit against the state and could not be maintained. The court then proceeded to consider the other questions, viz., that the Dairy and Food Commissioner was exceeding his authority in sending out circulars to dealers and advertising complainants' preparation was in violation of the Ohio statute, to the irreparable injury of complainants, and thereupon held that the Circuit Court had no jurisdiction to restrain the Dairy and Food Commissioner from doing the things complained of, saying:

> "We are now dealing with an officer of a state proceeding under a valid law of the state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found

guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority. It is claimed, however, that conceding that a court of equity cannot enjoin the prosecution of criminal offenses, as a general things, the rule is different when property rights are involved; and we are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights, although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining criminal proceedings alleged to be indirectly destructive of property rights. Many criminal prosecutions may affect the property of the person accused. A property may be greatly injured by the wrongful and unfounded charge that it is used for immoral purposes. Such prosecution may destroy its rental value and prevent its sale, yet a court of equity could not usurp the right of trial which both the state and the accused have in a common-law court before a jury. Every citizen must submit to such accusation, if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships which may result in the execution of the law, against which courts of equity are powerless to relieve. Suess v. Noble (C. C.) 31 Fed. 855; Hemsley v. Myers (C. C.) 45 Fed. 283; Kramer v. Board, 53 N. Y. Super Ct. 492; Food Co. v. McNeal, 1 Ohio N. P. 266."

(113 Fed., 625.)

The court further said:

"Again, the act is argued to be unconstitutional because of the construction put upon it by the food commissioner, and this 'construction' is his contention that

Ariosa is coffee so coated as to conceal damage or inferiority, and that it is not a compound or mixture within the meaning of the statute. These are the very questions the decision of which the statute vests in the discretion of the commissioner, as a preliminary matter, in determining to institute prosecutions in the enforcement of the law which he is charged to execute, leaving the guilt or innocence of the party charged to be decided by the proper tribunals when prosecutions are instituted under the law. The constitutionality of the acts is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions thereunder against those guiltless of a violation of its provisions. There are cases, as insisted by the learned counsel for the complainant, where the operation of a statute constitutional in itself, as administered by the state authorities, may deprive the citizens of rights secured by the constitution of the United States, where a federal court will interfere by injunction to secure to persons aggrieved the benefits of the federal constitution; but they are not cases where a court of equity must draw to itself the administration of the criminal law of a state, sought to be enforced by the officers of the state, and thus determine whether crimes may be prosecuted under valid enactments, because a party may be able to satisfy the court that he is in fact innocent of the charge. Such a construction of the powers of a court of equity would result in a confusion of jurisdiction, and an embarrassment of the ordinary processes of the law without precedent. If this bill can be entertained, it remits to the federal courts the supervision of the pure-food laws of the states, and their dockets will be crowded with cases of those claiming that their particular articles of food and drink are not within the terms of the law.

"Nor do we think that there is ground for injunction in the allegations of the bill that the food commissioner is publishing the fact that the product of the complainant is within the prohibition of the law. If

> this publication is made to those dealing in the article, it would be within the duty of the commissioner, in advising of contemplated prosecutions. If such publications are libelous, the law affords other means of redress. Francis v. Flinn, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165." (113 Fed. 626-627.)

The case was then removed to this court where the decision of the Circuit Court of Appeals was affirmed upon the ground that as the jurisdiction of the Circuit Court depended entirely upon the opposite parties of the controversy being citizens of different states the decree of the Circuit Court of Appeals was final.

Arbuckle v. Blackburn, 191 U. S. 405.

It will be perceived that the denial of the right of the Circuit Court to entertain jurisdiction of the bill of complaint in the Arbuckle case was not based upon the ground alone that the suit was a suit against the state. The court held that so far as the bill sought to restrain criminal prosecutions it was in effect a suit against the state, and then proceeded to inquire whether as a court of equity the Circuit Court had jurisdiction of the other matters alleged in the bill, viz., to enjoin the Dairy and Food Commissioner from advertising and sending out circulars to dealers, claiming that complainants' products were in violation of law; and upon this branch of the case expressly held that a federal court of equity was without jurisdiction to grant relief.

(b) The case of Arbuckle v. Blackburn and the case at bar are not distinguishable.

A comparison of the records in these two cases shows that with the exception that the bill of complaint in this case does not ask to restrain criminal prosecutions the cases are precisely alike. The gravamen in the bill in each case is

that the Dairy and Food Commissioner exceeded his authority in advertising and sending out circulars to dealers in complainants' preparations, stating that their products were illegal under the law and could not be sold in the state. This it is alleged the Dairy and Food Commissioner is not authorized to do by the provisions of the statute, and that his acts are causing complainants irreparable injury.

In the case at bar, as in the Arbuckle case, complainants insist that their products are not in violation of the statute, while the Dairy and Food Commissioner insists that they are. The Circuit Court sitting as a court of equity, is therefore necessarily called upon to determine whether or not complainants are guilty or not guilty of violating a penal statute of Michigan.

It was contended below by counsel for complainants that it was immaterial whether complainants' products were in violation of the Michigan statute; that this question was not involved; that the acts of the Dairy and Food Commissioner in sending out circulars and warning dealers were unauthorized by statute, and that complainants were therefore entitled to a decree restraining the unauthorized acts. In other words, the contention was that notwithstanding complainants might be shown upon the hearing to be violating the criminal laws of Michigan, a federal court of equity had jurisdiction, and would be required, to aid them in continuing to do so by restraining the Dairy and Food Commissioner from proceeding in a manner claimed to be unauthorized by law.

Clearly this is not the law. If it should appear upon the hearing that complainants' syrups were in violation of the Michigan statute, a court of equity would not restrain the Dairy and Food Commissioner from condemning such syrups in any manner he might choose. The question of whether or not the method of procedure adopted by him was authorized by law would be wholly immaterial.

Pittsburg, etc., Ry. Co. v. Town of Crothersville, 159 Ind. 330.

In that case it was sought to enjoin the Board of Health and marshal from abating certain stockpens as a public nuisance, it being alleged that the defendants were without authority to abate such nuisance. The court there said:

> "It is a well settled maxim, that he who comes into equity must come with clean hands. Here appellant, under the facts found, seeks the aid of equity to enjoin the appellees from abating a public nuisance maintained by it, on the ground that they have no right to abate it. To grant such relief to appellant, who is maintaining the public nuisance, would be contrary to the well settled principles of equity. (Citing numerous authorities.)
>
> "To grant appellant the relief prayed for under the facts found would be to aid it in maintaining a public nuisance, a crime under the laws of this state.
>
> "It follows that, even if appellant's contention that appellees had no authority to abate said public nuisance is correct,—a question we need not and do not decide,—the conclusions of law are not erroneous."

It appears from the bill of complaint filed herein that complainants contend that their syrups are not in violation of the Michigan statute, and that the Dairy and Food Commissioner claims that they are. So that we say the court would be called upon to determine whether complainants' products were in violation of the statute; in other words, to determine the guilt or innocence of complainants. This is precisely what the court in the Arbuckle case said a federal court of equity had no jurisdiction to determine, and the case at bar is squarely within the decision of that case, which is applicable and controlling.

(c) The District Judge, therefore, upon the hearing in

this case upon the application for a temporary injunction was confronted with this situation: The Circuit Court of Appeals of his (the sixth) Circuit had expressly held in the Arbuckle case that the Circuit Court was without jurisdiction to entertain the bill of complaint, and the decision of the Circuit Court of Appeals had been affirmed by this court. If the Circuit Court entertained the bill of complaint and granted the relief prayed for, defendant, upon appeal to the Circuit Court of Appeals, could unquestionably have secured a reversal of the decision upon the authority of Arbuckle v. Blackburn, supra. In this situation the only course open for the Circuit Court to pursue was that followed by the Circuit Court in the case of Arbuckle v. Blackburn, viz., to deny the temporary injunction and dismiss the bill of complaint for want of jurisdiction.

(d) Complainants now seek to avoid the effect of the decision of the Circuit Court of Appeals in the case of Arbuckle v. Blackburn, and of this court in the same case, by a direct appeal to this court upon the question of jurisdiction. If this court should now say that the Circuit Court had jurisdiction to entertain the bill of complaint herein, it must necessarily overrule the decision of the Circuit Court of Appeals in the case of Arbuckle v. Blackburn, and its own decision in the same case affirming the decision of the Circuit Court of Appeals. In other words, it must overrule what has been regarded as the settled law in the federal courts ever since the decision of the Circuit Court of Appeals was rendered in January, 1902; a period of six years, and the federal courts will be compelled to exercise a supervisory control over all the acts of the Dairy and Food Commissioners of the several states. As was said by Mr. Justice Day, in Arbuckle v. Blackburn, supra:

"If this bill can be entertained, it remits to the

federal courts the supervision of the pure-food laws of the states, and their dockets will be crowded with cases of those claiming that their particular articles of food and drink are not within the terms of the law." (113 Fed. 626.)

II.

The effect of the decision of the Supreme Court of Michigan in Pratt Food Company v. Bird.

It is contended by counsel for complainants that, because the Supreme Court of Michigan lately held in the case of Pratt Food Co. v. Bird, 148 Mich., 641, that a state court of equity had jurisdiction to restrain the Dairy and Food Commissioner from issuing bulletins or circulars against food products claimed to be unlawful, the federal courts of equity are bound to entertain jurisdiction in similar cases.

While it may be the general rule that when a citizen of a state is entitled to go into the state courts, a citizen of another state may invoke the jurisdiction of the federal courts in like cases, we do not understand this to be a rule of universal application. Certainly the decision of the state court could not confer jurisdiction upon the federal courts, and the rule contended for clearly is inapplicable where the federal courts have previously held that they were without jurisdiction in such cases.

This case is authority for the contention of defendant rather than the contention of complainants. It gives complainants ample remedy by proceedings in the state courts and affords a substantial basis for the application of the rule laid down in the case of

Freeney v. First Nat'l Bank 16 Fed., 433,

where it was held that where parties have ample remedy by proceedings in the state courts, and the federal court clearly has no jurisdiction of most matters complained of, and as to others the jurisdiction is extremely doubtful, the federal court will refuse to assume jurisdiction.

III.

Whether or not this proceeding is a suit against the state, the decision of the Circuit Court was correct.

Counsel for defendant did not claim in the Circuit Court, and do not now claim, that this proceeding is a suit against the state. It is our contention that under the decision of the Circuit Court of Appeals in the case of Arbuckle v. Blackburn, supra, a federal court of equity has no jurisdiction of the subject matter of the bill of complaint, viz., that it has no jurisdiction to restrain the Dairy and Food Commissioner of a state from issuing bulletins or circulars claiming that an article of food is in violation of the criminal laws of a state.

It appears from the certificate of the district judge (R., p. 52) that he dismissed the bill for want of jurisdiction for the reason that it appeared that the suit was in effect a suit against the state of Michigan, and that question appears to be the question certified to this court.

However, in the opinion of the court (R., p. 49) and the order of the court (p. 48) nothing is said with reference to the suit being a suit against the state. The opinion of the district judge shows that in dismissing the bill he was governed by the decision of the Circuit Court of Appeals in the case of Arbuckle v. Blackburn, supra, and states that that

case "is conclusive against the jurisdiction of a court of equity over the matters set forth in the bill." The order recites that—

> "It appearing satisfactorily to the court that it has no jurisdiction of this cause, it is ordered, that the motion for a preliminary injunction be denied and that the bill of complaint be dismissed for want of jurisdiction."

We do not, however, understand that the reason set forth in the certificate for dismissing the bill of complaint for want of jurisdiction is material if, in fact, the conclusion of the court that it had no jurisdiction was right as a matter of law. That notwithstanding the court may have erred in stating that the reason that it did not have jurisdiction was because the suit was in effect a suit against the state, this court will not reverse the decision of the lower court merely because the reason given for the conclusion was not the correct reason.

> Pa. Ry. Co. v. Wabash Ry. Co., 157 U. S. 225;
> Moffatt v. Smith, 101 Fed. 771;
> 3 Cyc. 221, and cases cited.

IV.

The Circuit Court had the right at any stage of the proceedings and upon its own motion to dismiss the bill for want of jurisdiction.

It is also contended by counsel for complainants that the Circuit Court erred in dismissing the bill of its own motion and without notice to the parties or their solicitors.

We submit in this there was no error. The court followed

the precedent established in Arbuckle v. Blackburn, supra, where this was the course pursued.

The authorities cited by counsel for complainants in his brief as to the irregularity of this method of procedure might possibly have some bearing if the act of March 3, 1875, were the only authority possessed by the court to dismiss the bill of complaint. We contend, however, that regardless of this act the court had the inherent right to dismiss the bill of complaint in this case at any stage of the proceedings. Under the decision in Arbuckle v. Blackburn the court had no jurisdiction of the subject matter of the suit. When this is the case the rule universally applied is that the court may at any stage of the proceedings, and upon its own motion, dismiss the case.

11 Cyc., p. 701, and cases cited;
Heriot v. Davis, Fed. cases No. 6404 (2 Woodb. & M. 229).

For these reasons we submit that the decision of the Circuit Court that it was without jurisdiction to entertain the bill of complaint filed herein was correct and should be affirmed.

JNO. E. BIRD,
Attorney General of Michigan,
GEO. S. LAW,
Assistant Attorney General,
Solicitors for Appellee.

SCULLY v. BIRD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 353. Submitted April 20, 1908.—Decided May 4, 1908.

This court will not assume an inconsistency to exist between the opinion of the Circuit Court and its certificate.

On certificate that the bill was dismissed solely because the suit was against the State within the meaning of the Eleventh Amendment and therefore not within the jurisdiction of the Federal court as such, this court cannot determine whether the bill should have been dismissed because not presenting a case for equitable relief.

A suit by a citizen of another State to restrain a state officer from improperly enforcing a state statute, where no criminal prosecution has been commenced, *held*, in this case, not to be an action against the State within the meaning of the Eleventh Amendment.

THE facts are stated in the opinion.

Mr. E. T. Fenwick, for appellants:

The prohibition of the Eleventh Amendment does not apply where a suit is brought against defendants who, claiming to act as officers of the State, and under color of a statute which is valid and constitutional, but wrongfully administered by them, commit, or threaten to commit, acts of wrong or injury to the rights and property of the plaintiff, or make such administration of the statute an illegal burden and exaction upon the plaintiff. Bates Fed. Eq. Pro. (1901 ed.), § 560, Subd. 4; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 388.

Nor where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In this class of cases, the defendant is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that

his authority in law was sufficient to protect him. *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 451.

The State is a political corporate body, can act only through its agents, and can command only by laws. It is necessary, therefore, for a defendant who seeks to substitute the State in his place, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. Bates, § 560, Subd. 8; *Poindexter* v. *Greenhow*, 114 U. S. 288.

Whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. Bates, § 560, Subd. 9; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 391.

The suit at bar might have been maintained in the state courts of Michigan against said defendant. *Pratt Food Co.* v. *Bird*, 148 Michigan, 631.

The statutes of Michigan confer no authority upon the defendant to do the acts of which complaint is made against him in this case. Comp. Laws Michigan, § 4978.

The suit at bar should not have been dismissed under § 5 of the act of 1875. U. S. Comp. Stat., § 639; *Farmington* v. *Pillsbury*, 114 U. S. 138; *Williams* v. *Mattawa*, 104 U. S. 212; *Mattocks* v. *Baker*, 2 Fed. Rep. 457.

The question whether the suit at bar is, in legal effect, a suit against the State is one on the merits of the case, and it was error for the trial court to hold that it was a question of jurisdiction, and to dismiss the bill on that account for want of jurisdiction. *Ill. Cent. R. R. Co.* v. *Adams*, 180 U. S. 28.

Mr. John E. Bird, Attorney General of the State of Michigan, and *Mr. George S. Law*, for appellee:

A decree denying the temporary injunction and dismissing the bill of complaint, was the only decree that could have been rendered by the Circuit Court. *Arbuckle* v. *Blackburn*, 113 Fed. Rep. 616; *S. C.*, 191 U. S. 405.

Pratt Food Co. v. *Bird*, 148 Michigan, 641, relied upon by

complainants, is rather an authority for the contention of defendant. It gives complainants ample remedy by proceedings in the state courts. *Freeney* v. *First National Bank*, 16 Fed. Rep. 433.

Whether or not this proceeding is a suit against the State, the decision of the Circuit Court was correct. *Penna. Ry. Co.* v. *Wabash Ry. Co.*, 157 U. S. 225; *Moffatt* v. *Smith*, 101 Fed. Rep. 771; 3 Cyc. 221, and cases cited.

The Circuit Court had the right at any stage of the proceedings, and upon its own motion, to dismiss the bill for want of jurisdiction. 11 Cyc., p. 701, and cases cited; *Heriot* v. *Davis*, Fed. Cases, No. 6,404 (2 Woodb. & M. 229).

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an appeal directly from the Circuit Court from a decree dismissing the bill of appellants for want of jurisdiction.

The bill sought an injunction against certain acts of the appellee, who is the dairy and food commissioner of the State of Michigan, and who, it is alleged, under cover of his office is injuriously affecting the reputation and sale of certain products manufactured by appellants. The acts complained of will be detailed more fully hereafter. It is enough to say preliminarily that appellants alleged in their bill that their business is the manufacturing, refining and selling of various food products, and more particularly the manufacturing, blending and selling of syrups used for food products; that their principal place of business is in Chicago, and that their business is "commonly recognized and known as an honorable and legitimate commercial industry and a legal and necessary adjunct to organized society;" and that they have large quantities of their products in Michigan "which prior to the acts complained of, found a ready sale in that State, which sales resulted in fair and continuous profit" to them.

The court dismissed the bill, and recites in its certificate that the decree "was made and entered by the court on its own motion and without notice to any of the parties to this suit or

their attorneys, except that the question of jurisdiction was argued on the motion for preliminary injunction, it appearing to the court from the face of the bill that this suit is, in effect, a suit against the State of Michigan within the meaning of the Eleventh Amendment to the Constitution of the United States, and that, therefore, this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of a Federal court."

The court expressed its reason for its action in an opinion as follows:

"Upon examination of the authorities cited upon the arguments had in this cause upon the matters above related, it is clear that the case of *Arbuckle* v. *Blackburn, Dairy and Food Commissioner of Ohio*, 113 Fed. Rep. 616 (C. C. A.), is conclusive against the jurisdiction of a court of equity over the matters set forth in the bill. It is argued in behalf of complainants that the case at bar is differentiated from that decision of the Court of Appeals in the case just cited. It is not perceived that there is any substantial difference in the facts of the two cases which would exclude the application of *Arbuckle* v. *Blackburn*. That case is conclusive that this court has no jurisdiction to entertain a suit of this nature, and the only order which can be made in this case, notwithstanding the entry of the order *pro confesso*, is one for a dismissal of the bill for want of jurisdiction."

Arbuckle v. *Blackburn* was appealed to this court, but the appeal was dismissed, on the ground that the jurisdiction of the Circuit Court was " 'dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different States,' and the decree of the Circuit Court of Appeals was final." The questions passed on by the latter court were not considered or decided. 191 U. S. 405.

The Attorney General of the State, who appears as counsel for the appellee, does not contend that this is a suit against the State. He says: "Counsel for defendant did not claim in the Circuit Court, and do not now claim, that this proceeding is a suit against the State. It is our contention that under the de-

cision of the Circuit Court of Appeals in the case of *Arbuckle* v. *Blackburn*, *supra*, a Federal court of equity has no jurisdiction of the subject-matter of the bill of complaint, viz., that it has no jurisdiction to restrain the dairy and food commissioner of a State from issuing bulletins or circulars claiming that an article of food is in violation of the criminal laws of a State."

And it is urged that such was the reason given by the court in its opinion and order dismissing the bill, and that as the decision of the court was right it should not be reversed, because the reason given for it in the certificate was not the correct reason. But we cannot assume that there is inconsistency between the opinion and order of the court and its certificate. We, therefore, accept the latter as expressing the ground of the court's action. We would have no jurisdiction on this appeal unless the jurisdiction of the Circuit Court was in question as a Federal court; and whether the bill presented a case for equitable relief does not present a question of the jurisdiction of the court as a court of the United States. *Blythe* v. *Hinckley*, 173 U. S. 501; *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28, 35. Indeed, it is urged by appellant that whether a suit is one against a State is not a question of jurisdiction, but a question on the merits, and *Illinois Central R. R. Co.* v. *Adams*, *supra*, is cited.

That suit was brought by the railroad company against Adams, who was a revenue agent of the State of Mississippi, and the railroad commission of the State, to enjoin the latter from certifying an assessment for taxes on a railroad in which the Illinois Central had an interest and to enjoin the revenue agent from beginning any suit or advising any of the municipalities along the line of the road to bring suit for the recovery of such taxes. The bill was dismissed for want of jurisdiction and the case was appealed to this court. One of the grounds for the dismissal was, as certified, "that there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi and in violation of the Eleventh Amendment to the Constitution of the United States." We said, by Mr. Jus-

tice Brown, that such a question is "one which we think belongs to the merits rather than to the jurisdiction." And further: "If it were a suit directly against the State by name, it would be so palpably in violation of that Amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the State, but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the State that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 858, wherein he makes the following observation: 'The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendant; whether they are to be considered as having a real interest, or as being only nominal parties.'" Again, 180 U. S. 38: "But where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. . . . But whether this is a question of jurisdiction or not, we think it should be raised either by demurrer to the bill or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings and cannot be made available to settle important questions of law." Cases were cited, and it was further observed that in *Fitts* v. *McGhee*, 172 U. S. 516, the question whether the officers proceeded against "were representatives of the State was disposed of upon answers filed."

The suit at bar has not the "palpable" evidence of being a suit against the State by being against the State by name. Do the allegations of the bill make it such?

The suit is brought against appellee, described as a citizen of Michigan, by appellants, described as citizens of Illinois. It is true it is alleged that appellee is the state dairy and food commissioner of Michigan, and that by an act of the general assembly of the State, passed the second of June, 1893, the office of dairy and food commissioner was created, and that it was by such act and amendatory acts made the duty of appellee as commissioner "to attend to the enforcement of all the laws of the State of Michigan against the unlawful labeling, fraud, adulteration or impurity of foods, sold, offered for sale, exposed for sale or had in possession with intent to sell in the State of Michigan," and that it is the duty of the commissioner is clearly set forth in the acts.

It is alleged that it is his duty to prosecute violators of the act. That it came to the notice of the appellants that the appellee questioned the legality of some of the food products manufactured by them and sold in Michigan, and that they represented, through their attorney, that they were manufacturers of certain brands of maple and cane syrups which they were desirous of having properly labeled, that appellee refused to accept the statement of the attorney as being made in good faith, and stated that none of the syrups manufactured by appellants contained any maple syrup whatever, but were mixtures of inferior syrups containing substances which produced "imitation maple flavors," and accused appellants of not being desirous of "obtaining a wise and just interpretation of the food laws of the State of Michigan," and refused to give appellants' attorney "any information as to how a brand of maple syrup and cane syrup should be properly and legally labeled under said food laws," and refused to consider how such syrups should be labeled, and insisted that he would only permit appellants' syrups "to be sold simply as 'syrup,' without any qualifying words whatever to inform purchasers of the same of the nature of such syrups." The bill sets forth efforts made by appellants to have the question of the legal labeling of their products decided by the Assistant Attorney General of the State,

and asked the latter officer to bring a test case in the courts of Michigan or "arbitrate the question at issue." To which the Assistant Attorney General replied "that they did not arbitrate matters in Michigan, but that they were 'fighters.'"

It is alleged that appellants were advised by their attorney that the proper course for them to pursue would be to label their "Westmoreland" and "Triumph" brands of syrups as nearly as possible in accordance with the laws of Michigan, and in compliance with that opinion they devised labels which described the "Westmoreland" as a brand of pure maple syrup and pure rock candy syrup, and the "Triumph" as a "delicious brand" of the same syrups. And it is alleged that both brands are composed of maple syrup and cane syrup, "and no other ingredients whatever," and that rock candy syrup is the purest kind of cane syrup, and is the only cane syrup used by appellants.

It is alleged that appellants have shipped into the State of Michigan said brands of syrups labeled and branded as aforesaid and that shortly after such shipment the appellee "assumed a hostile attitude towards all of said syrups and contended and persists in contending that the labeling upon said syrups does not comply with the laws of the State, and that he and his inspectors "at once commenced a systematic crusade" against the sale of the syrups, and appellant is informed that appellee contends that "the words 'maple syrup' should not appear on any of the said labels in any manner or form whatever, even though said syrups actually contained a representative proportion of pure maple syrup." The bill contains the following paragraph:

"Your orators further represent that they are informed and believe that the said crusade, waged against their said brands of syrup by the said Arthur C. Bird and his inspectors, is not in good faith, but that the same is actuated by malice and ill will on the part of said Arthur C. Bird towards your orator, growing out of the conference between your orators' said attorney and the said Arthur C. Bird hereinbefore referred to,

and that the activity of said Arthur C. Bird to prevent the sale of said brands of syrups is caused by the malicious desire on the part of Arthur C. Bird to ruin your orators' business in the State of Michigan."

It is further alleged that "the crusade against said brands of syrups" is conducted by appellee and his food inspectors, acting under his direction, by visiting all grocers, merchants and dealers in the syrups, and informing them that by selling said syrups they would subject themselves to criminal prosecution. And that it has been the custom and practice of appellees since the shipment of the syrups to the State to write numerous letters to dealers in the State, warning them that the syrups were illegally labeled, and directing them to return all such syrups to appellants, and directing such dealers to make prompt reply "as to what course they had pursued in relation to said syrups," and what action they had taken to return the same.

It is also alleged that the food inspectors, under the direction of appellee, forcibly removed appellants' brands of syrups from the shelves of dealers, against the consent of said dealers. And "that in no case, so far as your orators are informed and believe, was any sample taken of such syrups so taken from the shelves as aforesaid, nor were the said syrups sealed as required by the statutes of the State of Michigan, nor were any prosecutions ever commenced against said grocers or dealers, although ample time has elapsed since the acts complained of as aforesaid."

The bill sets forth the efforts of appellants to have appellee commence prosecution against their agents and jobbers and against grocers and dealers handling their syrups, so that they might have an opportunity of defending the legality of their syrups "in the proper courts of the State of Michigan, and in a proper manner." These efforts, it is alleged, have failed; and it is further alleged that in all the acts and doings of the appellee complained of he was and is acting as a private citizen of the State, but "under cover of his said office of dairy and food commissioner." That his powers and duties as such of-

ficer are clearly defined in the statutes to which reference is made.

The intimidating effect of the acts of appellee upon the dealers in the syrups is set out and the detriment resulting therefrom to appellants detailed.

It is manifest from this summary of the allegations of the bill that this is not a suit against the State. *Cunningham* v. *M. & B. Rd. Co.*, 109 U. S. 446; *Pratt Food Co.* v. *Bird*, 148 Michigan, 631. It is not a suit, as was *Arbuckle* v. *Blackburn*, *supra*, to restrain a criminal prosecution. Indeed, the bill alleges that a criminal prosecution was invited by appellant and refused by appellee, and refused, it is alleged, to serve the purpose of what the bill denominates a "crusade" against the syrups of appellants, and in dereliction of duties enjoined by the statutes of the State.

Decree reversed and the case remanded for further proceedings.

MR. JUSTICE HARLAN concurs in the decree.